# Petition

81-1685

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No.

In The

# Supreme Court of the United States

OCTOBER TERM, 1981

LEONARD LIMMER, et al.,
*Petitioners*

*v.*

SUSAN FERNANDES, a/k/a SANTANI, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1.

Whether, due to the configuration, design and confined areas of a public airport terminal, a City Ordinance may limit charitable fund solicitation to designated areas on adjacent sidewalks, so long as there is no interference in the terminal with freedom of speech which is not connected with money solicitation.

2.

Whether an airport terminal, the interior of which is totally leased to an airline carrier, is a "public forum" subject to First Amendment rights.

3.

Whether a Regional Airport Board's airline tenants, who lease the total interior of an airport terminal, must be joined as Indispensable Parties in a suit against the Airport Proprietor by charitable solicitors seeking use of terminal space under a claimed First Amendment right.

4.

Whether a Regional Airport Board created under a State Statute may be held liable for Attorneys' Fees under 42 USC 1983 and 1988, when acting in a legislative capacity only.

5.

Whether a City Ordinance governing money solicitation by charitable organizations is facially unconstitutional on the basis of prior restraint because:

(a) of a requirement to obtain a Permit which identifies the applicant, states the purpose of, the date and time of,

and the number of people participating in the fund solicitation;

(b) a small fee is charged to help defray the cost of the applicants' personal (non-public) special project;

(c) it provides reasons (not related to prior restraint of speech) for permit refusal and the cancellation of permits already issued;

(d) it provides reasonable regulation of the time, location, manner and number of persons involved in the solicitation project; and

(e) it provides for a timely administrative appeal from Permit refusal or cancellation.

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## LIST OF ALL PARTIES

Petitioner Len Limmer is the Dallas-Fort Worth Regional Airport's Director of Public Safety; Petitioner John Boyle is the City Attorney of the City of Grapevine, Texas; and Petitioner William McClain is the Police Chief of the City of Grapevine, Texas.

Respondent Susan Fernandes is a member of the Hare Krishna organization; and the International Society of Krishna Consciousness is an organization authorized by the laws of the State of Texas to operate as a charitable or nonprofit organization.

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Although not named parties in this proceeding, the Cities of Dallas, Texas, and Fort Worth, Texas, are each represented by the City Attorneys; and the Dallas-Fort Worth Regional Airport Board, ("DFW"), an agency of the two cities, is represented herein by its legal counsel. The Dallas-Fort Worth Regional Airport is owned jointly by the Cities of Dallas and Fort Worth, and is operated by the Regional Airport Board.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Leonard Limmer, John F. Boyle and William McClain petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit, in this case.

## OPINIONS BELOW

The Opinion of the Court of Appeals (App. A) is reported in 663 F.2d 619 (CA5, 1981).

The Opinion of the District Court (App. C) is reported in 465 F. Supp. 493 (N.D. Tex. 1979).

The Opinion of the same District Court in a companion case (App. H) is reported in 391 F.Supp. 606 (N.D. Tex. 1975).

## JURISDICTION

The Judgment of the Court of Appeals was entered on December 11, 1981. A Petition for Rehearing by the Court and a Petition for Rehearing En Banc were both denied on January 27, 1982. The jurisdiction of this Court is invoked under 28 USC 1254(1).

The jurisdiction of this case was stated by the Federal District Judge in the Court of First Instance to be based upon 42 USC 1983, and 28 USC 1331.

## CONSTITUTIONAL, STATUTORY, ETC., PROVISIONS INVOLVED

(1) The First Amendment to the United States Constitution reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) Those provisions of the U. S. Code which are applicable to this discussion are 42 USC 1983 and 42 USC 1988. These statutes read as follows:

> **"§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 83 Stat. 1284."

"§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330."

(3) The State Statutes involved in this discussion are Articles 46d-14 and 46d-15. These articles are included in the Appendix as App. L.

(4) There are three Ordinances and one Resolution involved in the discussion in this Petition; the three Ordinances are those of the Cities of Dallas, Texas, Fort Worth,

Texas and Grapevine, Texas, all of which read identically. They adopt the Resolution of the Board of Directors of the Dallas-Fort Worth Regional Airport verbatim. This Resolution is the subject matter of this litigation and, for brevity, is the only instrument shown as Appendix I.

## STATEMENT OF THE CASE

In 1975, ISKCON, a corporation authorized to conduct business in the State of Texas as a non-profit organization, filed suit against the Cities of Dallas, Texas, Fort Worth, Texas, Grapevine, Texas and the Dallas-Fort Worth Regional Airport Board, seeking an Injunction to restrain the Board's officers from interfering with ISKCON's (Hare Krishna's) money solicitation in the terminals at the Dallas-Fort Worth Regional Airport (DFW) without a Permit. A Permit was required under an Airport Regulation which simply prohibited the solicitation of funds for any purpose, commercial or charitable, unless a Permit had been previously granted by the Airport Board's officers.

The District Court for the Northern District of Texas refused to restrain the Airport Board from enforcing the Regulation (which was also an Ordinance of each of the Cities of Dallas, Fort Worth and Grapevine). This Opinion is reported as *ISKCON, et al., v. Dallas-Fort Worth Regional Airport Board, et al.*, 391 F. Supp. 505 (N.D. Tex. 1975, no appeal taken) (shown in App. H). This case was later dismissed by the Plaintiffs; and although they did not prevail, the Trial Judge later (in the case at bar) included Attorneys' Fees for the Plaintiffs in both the original case and the case at bar.

In December, 1976, the Board adopted as a Resolution, and the three Cities of Dallas, Fort Worth and Grapevine

thereafter passed as an Ordinance, certain new Regulations controlling fund solicitation at the Airport and providing that such solicitation should be *confined to the sidewalks* outside the terminal buildings. These Regulations are shown in Board Resolution form as Appendix I, and provide essentially the following:

(1) Definitions of "charitable organization" and "charitable solicitation";

(2) A requirement that a Permit be secured to solicit funds for charity on the Airport;

(3) A requirement that such Permit *must be granted*, unless one or more of five stated reasons exist in bar thereof;

(4) For a Six Dollar ($6.00) per day fee for each day of activity to partially defray the cost of the Board's administrative expense;

(5) For Permit cancellation for the same reasons as initial refusal;

(6) For reasonable regulation of the solicitation time, location, manner and number of solicitors involved;

(7) For an Administrative Appeal from refusal or cancellation of a Permit; and

(8) For a Severability and Savings Clause, a Penalty, and an Effective Date.

The Ordinance restricts *money solicitation* to the sidewalks adjacent to the terminals; no restriction of any kind is placed on free speech inside the terminals. Nor is there any restriction on an Applicant's rental of space inside the terminals under the same conditions granted all others for terminal space rentals.

The Permits are to be issued for not more than eight (8) days per month (not necessarily consecutively) between the hours of 9:00 a.m. and 6:00 p.m.; no more than four (4) Permittees are permitted at one time at any one terminal. An identification badge is required to be worn. There are restrictions on excessive noise, the placement of benches and chairs on the sidewalks, the interference with the access of and flow of pedestrian traffic, the obstruction of entrances and exits, and promiscuous littering of the sidewalks with discarded literature.

One of the provisions for refusal to grant a Permit restricts the amount of administrative expense payable to the agent-solicitor for charitable collection to twenty-five percent (25%) of the total collection. A great deal of emphasis is placed on this question by the two lower Courts' Opinions, and our reply is reserved for discussion under the Reasons for Granting this Writ.

*There is an essential element in this case of which we must make the Court aware. Nowhere in the Ordinance is there an attempt to censor free speech or written material, and nowhere is there an attempt made to determine whether an Applicant is, or is not, representing a true charitable cause, or whether the cause is a "religious" one.* The emphasis placed on the statement just made is there because of the persistent erroneous conclusions of the two lower Courts that this Ordinance contains "Freedman Prior Restraints".

During the trial, Petitioners made a Motion to Join the Airline Tenants as Indispensable or Necessary Parties because they, as Lessees of the entire interior portions of the terminals, had, and have, a direct proprietary interest in the subject matter of this suit; *i.e.*, whether uncontrolled groups of solicitors should roam space leased to these Ten-

ants in the terminals, interfering with and impeding the business of air transportation, which is the primary purpose of these structures.

The Trial Court initially held the entire Ordinance invalid, (App. C) but upon Motion for New Trial, modified the Opinion (App. D) to reflect that two sections of the Ordinance, dealing with (1) a prohibition against interference with the free passage or access of other persons and (2) a similar prohibition against obstructions of entrances and exits, were both valid and constitutional.

The Fifth Circuit, in its Opinion (App. A) affirmed the Judgment of the District Court, except in minor particulars wherein the Circuit held that the prohibition against impeding baggage handling, etc., valid and the requirement that if the information contained in the Application to the Board is false, then the Permit could be legally refused. Petitioners' Fifth Circuit Petitions for Rehearing and for Rehearing En Banc were denied on January 27, 1982 (App. B).

## REASONS FOR GRANTING THE WRIT

There are two basic, compelling reasons, among others, for granting this Writ:

**1.**

The Decisions of the District and Circuit Courts of the United States on the subject involved here are hopelessly at variance with each other, and with the Decisions of this Court.

**2.**

The immense number of people whose lives and activities are in some way connected with this subject matter, generally adversely, should be a prime factor for this Court's consideration.

1.

**a. Restricted Locations for Solicitors**

Some of the Decisions of the lower courts on the public solicitation subject are a confused hodge-podge of distorted and incomplete factual and legal data, and many times are based upon whichever First Amendment case or line of cases is suggested initially, or which comes to mind at the time.

Submitted here as prime examples are the Fifth Circuit's Opinion in the case at bar, as well as that of the District Court, when compared to this Court's Opinion in *Heffron v. ISKCON*, —— U.S. ——, 69 L.Ed. 2d 298, 101 S.Ct. 2559 (1931).

In *Heffron*, the question concerned the restriction of solicitors to booths at the State Fairgrounds in St. Paul, Minnesota. The question facing the Court in that case is quoted below, but is varied *only* by substituting the *name of the facility:*

> "The question presented for review is whether the State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a [*municipal airport*] to conduct those activities only at an assigned location within the [*airport*], even though application of the rule limits the religious practices of the organization."

Then this Court says:

> "A valid time, place, and manner regulation must also 'serve a significant governmental interest.' . . . . Here, the principle justification asserted by the state in support of Rule 6.05 is the need to maintain the orderly movement of the crowd, given the large number of exhibitors and persons attending the Fair."

The Supreme Court held in *Heffron* that the State of Minnesota had shown a compelling and substantial interest

in passing Regulations which restricted solicitation to fixed locations (rented booths on the State Fairgrounds) because:

(1) the space (Fairgrounds) was small and congested, being 125 acres;

(2) the large number of people in attendance (90,000-120,000 per day); and

(3) the short tenure of the Fair season (two weeks).

It is further stated in *Heffron* that the Krishnas have no more right to solicit than any other person, whether theirs be a mandated, compulsory religious ritual or a simple administrative process.

It is further observed by this Court that the Krishnas could move about the Fairgrounds and freely speak to any and all; that freedom of speech *did not necessarily* include solicitation of money.

In the case at bar the Circuit Court has held that DFW has not shown enough compelling need or interest in the subject matter of the Ordinances under review to enforce a regulation that is *exactly like the Minnesota law* with respect to *location* (but more liberal as to the mobility) of the solicitors. This, of course, is appalling error. Based upon the three criteria used by the *Heffron* Court, we submit the following comparison with the facts at DFW Airport:

1. The space at the Airport consists of about 1½ acres of enclosure per terminal, all consisting of narrow corridors;

2. There is an average of 18,000-22,000 people using this area per terminal in a day; and

3. The operation is continuous.

For a Court to conclude that these three circumstances were of so little significance and so different from those

shown in *Heffron* that a distinction could be made between the cases on this point is not consistent with sound logic.

If a *distinction* is made between these cases, it has to be that the circumstances at Dallas-Fort Worth Airport *were so far more onerous and aggravated than those set out in Heffron* that DFW's justification for passage of its ordinance exceeded that of the Minnesota Fair officials. The Circuit Court says that there is a distinction between the cases because Minnesota, "... unlike the D/FW Board, did provide a reasonable means of access to the forum: The Minnesota Krishnas could have applied for a booth within the fairground." This is a misstatement, and must be corrected. Nothing prevented or prevents the Krishnas from *renting space inside the terminals on the same basis as any other tenant.*

The question of access to the public, and the restrictions placed on *money solicitation*, not affecting other speech freedom, are the same in both cases. The DFW ordinance is more lenient in that no booth confinement is involved.

The Supreme Court, in *Heffron*, states, at p. 305, that the Petition for Writ of Certiorari in that case was granted in light of both the important Constitutional issues presented and *the conflicting results reached in similar cases* in various lower courts. Then, on the same page, in footnote 9 to that statement, the Court cites in support of "conflicting results" the following cases which invalidiate the "booth" rule: *ISKCON, Inc. v. Barber*, NO. 77-CV-328 (NDNY, Aug. 25, 1980), Rev'd ..... F.2d ..... (CA 2 1981); *Edwards v. Maryland State Fair and Agricultural Society, Inc.*, 628 F.2d 282 (CA 4 1980); *ISKCON, Inc. v. Bowen*, 600 F.2d 667 (CA 7) cert. den'd, 444 U.S. 963, 62 L.Ed. 2d 375, 100 S.Ct. 448 (1979); *ISKCON, Inc. v. Colorado State Fair and Industrial Exposition Commission*, 610 P.2d 486 (Colo. 1980).

The cases cited upholding the "booth" rule are: *Hynes v. Metropolitan Government of Nashville*, 478 F. Supp. 9 (MD Tenn 1979), and *ISKCON, Inc. v. Evans*, 440 F.Supp. 414 (SD Ohio 1977).

This footnote further states:

> "Related issues have been raised concerning religious groups' access to other types of public facilities. See *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (CA 5 1979) (airports); *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263 (CA 7 1978) (same); *International Society for Krishna Consciousness, Inc. v. McAvey*, 450 F.Supp. 1265 (SDNY 1978) (World Trade Center); *ISKCON v. Hays*, 438 F. Supp. 1077 (SD Fla 1977) (highway rest stops); *United States v. Boesewetter* 463 F.Supp. 370 (DC 1978) (performing arts center)."

The cases cited all concern limitation on the location of money solicitors, i.e., the "place" in the oft-stated "time, place and manner" regulations. We are aware of the cases holding that a combination of free speech with money solicitations does not nullify the free speech right; on the other hand, the Court has held before and *again holds and reaffirms in Heffron* that restrictions on ". . . solicitation activities to a fixed location" (at page 307) ". . . have often . . . [been] approved . . . provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information."

This quoted excerpt was followed precisely by DFW's ordinance. There was not a vestige of regulation of speech content in the ordinance. Proof at the trial showed two hundred complaints (only those reported in writing) against

Krishna solicitors in 20 months, including fist fights provoked by the solicitors.

As Mr. Justice Roberts points out in *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940) the Freedom of Religion and Freedom of Speech concept in the First Amendment " . . . embraces *two* concepts, . . . freedom to believe and freedom to *act*. The first is absolute, but in the nature of things the second *cannot be. Conduct* remains subject to regulation . . . ".

The terminals are small, narrow and crowded. In the Courts below, we have shown that there is nothing in an airport terminal of their size and configuration that lends itself to being described as a "public forum" as a matter of law.

The case of *Chicago Area Military Project, et al. v. City of Chicago*, 508 F.2d 921 (CA7, 1975) [Cert. Den., 421 U.S. 992, 44L.Ed. 2d 483, 95 S.Ct. 1999] holds that the "fingers" leading from main lobbies of airports at O'Hare Airport in Chicago, used for boarding or departing aircraft are not public forums. The DFW Airport terminal is nothing more than narrow hallway "fingers" and we still do not think the law should be construed as to make this (or for that matter any other airport terminal) a "public forum." These structures are in no manner similar to, nor is their purpose even close to being related to, sidewalks, parks, commons or spaces reserved for discussions in "soap-box" centers.

As above stated, the configuration of the D-FW terminals (slender semicircles or crescents) is entirely that of "fingers" or piers for loading and unloading passengers and will not admit of constant and harassing hucksterism that gives rise to the ugly incidents described at the trial of this case. The right to solicit on the sidewalks is ample under the

circumstances present here, and in full compliance with the First Amendment. Anyone who has recently traveled through an Airport can well understand the atmosphere of controlled panic attendant to crowded terminal facilities, coupled with Federally mandated security precautions necessary to protect the public from acts of terrorism and hijackings, as well as prevention of drug offenses, smuggling, immigration offenses, theft and other illegal activities. It is difficult indeed to imagine a more critically fragile setting, with up to 70,000 (at D-FW) captive patrons moving through narrow corridors, filled to capacity, all frantically searching for a particular gate or ticket counter, and each nervous enough about flying in general. This tenuous traffic movement and fragile atmosphere simply cannot tolerate the activities and assaults of solicitors, propagandizers, union picketers, political protestors, fundraisers and other non-airport related activities which are normally found in other settings and which have the same right to be anywhere that the Krishnas have a right to be. Certainly, the ordinance restricting all solicitation activities to the extensive sidewalk areas at D-FW, all of which abut the Terminal entranceways, is related to and serves the legitimate law enforcement, traffic flow and airport operational interests of the Airport proprietor without unnecessarily interfering with First Amendment freedoms. Most airport patrons use these sidewalks, so access to each patron is just as available to Krishna as it would be inside the Terminal buildings. The difference is the sidewalks are spread out and distribute patrons through numerous terminal entrances. The Terminal building configuration restricts the movement of patrons like a funnel, through narrow passageways leading to specific gates or checkpoints. Likewise, disruption of flow by solicitation is slight on the sidewalks, but immediate and major inside the building fingers. One or two solicitors can bring this inside flow to a halt. The ordinance prevents this hazard.

Mr. Justice Stewart observes in *Greer vs. Spock*, 424 U.S. 828, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976), that the lower court relied on *Flower vs. U.S.*, 407 U.S. 197, 32 L.Ed.2d 653, 92 S.Ct. 1842, in erroneously holding an army base to be a "public forum":

> "The Court of Appeals was mistaken, therefore, in thinking that the Flower case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that Flower stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' Adderley v. Florida, 385 U.S. 39, 48, 17 L.Ed. 2d 149, 87 S.Ct. 242. 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' Id., at 47, 17 L.Ed. 2d 149, 87 S.Ct. 242. See also Cox v. Louisiana, 379 US 559, 560-564, 13 L.Ed. 2d 487, 85 S.Ct. 476, Cf. Pell v. Procunier, 417 US 817, 41 L.Ed. 2d 495, 49 S.Ct. 2800, 71 Ohio Ops 2d 195."

**b. Prior Restraint**

The Circuit Court, in its opinion, concludes that the case *of The National Foundation, Inc. v. City of Fort Worth*, 414 F.2d 41 (CA5, 1969), [cert. den. 369 U.S. 1040, 24 L.Ed. 2d 684, 90 S.Ct. 688 (1970)] stands for nothing, but fails to point out that it conclusively holds that a City may not only enact a Permit system for charitable solicitors, but that a "cost-effectiveness requirement" may be made by limiting the amount of the collections that may be used as administrative expenses and payment to the solicitors. The National Foundation case was so misunderstood by the Circuit that the Circuit's Opinion in the case at bar concluded that religious

groups were specifically excluded from the Fort Worth ordinance requirement. This is not so, and the *National Foundation* case specifically holds that the cost-effectiveness requirement applied to *everyone*, churches included, except where the solicitation was made solely from within a church's *own congregation.*

The case of *ISKCON, Inc. v. Rochford*, 585 F.2d 263 (CA7, 1978) is at odds with the Fifth Circuit's Opinion herein. In that case, it was held that an *Administrative* Appeal might suffice to comply with procedural due process concerning an appeal from the refusal of a content-neutral Permit under the *Freedman* doctrine, although we do not believe the *Freedman* doctrine bears any relationship to the case at bar (because there is no prior restraint). If this Court believes otherwise, then, according to the holding in *Rochford*, the Administrative Appeal provided in the DFW Ordinance is sufficient for compliance.

**c. Attorneys' Fees**

The Circuit in the instant case affirmed an erroneous allowance of attorney's fees to the Respondents herein, in the face of the Supreme Court's holding in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed. 2d 401, 99 S.Ct. 1171 (1979). In that case the States of California and Nevada entered into a Compact to create the Planning Agency and vested the respective counties in which the Tahoe Basin is situated with authority through a single agency to coordinate and regulate Basin development for natural resources conservation purposes. The petitioners filed suit, claiming that the members of the governing body, *and its executive officers*, had acted under color of state law to deprive them of property without due process, and that they therefore had a cause of action authorized by 42 U.S.C., Section 1983.

The Supreme Court says:

"We turn, finally, to petitioners' challenge to the Court

of Appeals' holding that the individual respondents are absolutely immune from federal damage liability for actions taken in their legislative capacities.

The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th and 17th century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders. In *Tenney v. Brandhove*, 341 US 367, 95 L.Ed. 1019, 71 S.Ct. 783, this Court reasoned that Congress, in enacting § 1983 as part of the Civil Rights Act of 1871, could not have intended to 'overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here.' Id., at 376, 95 L.Ed. 1019, 71 S.Ct. 783. It therefore held that state legislators are absolutely immune from suit under § 1983 for actions 'in the sphere of legitimate legislative activities.' Ibid.

Petitioners do not challenge the validity of the holding in *Tenney*, or of the decisions recognizing the absolute immunity of federal legislators. Rather, their claim is that absolute immunity should be limited to the federal and state levels, and should not extend to individuals acting in a legislative capacity at a regional level. In support of this proposed distinction, petitioners argue that the source of immunity for state legislators is found in constitutional provisions, such as the Speech and Debate Clause, which have no application to a body such as TRPA. In addition, they point out that because state legislatures have effective means of disciplining their members that TRPA does not have, the threat of possible personal liability is necessary to deter lawless conduct by the governing members of TRPA.

We find these arguments unpersuasive. The Speech and Debate Clause of the United States Constitution is no more applicable to the members of state legislatures than to the members of TRPA. The States are of course

free to adopt similar clauses in their own Constitutions, and many have in fact done so. These clauses reflect the central importance attached to legislative freedom in our Nation. But the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a Speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the 'public good'. As Justice Frankfurter pointed out:

> 'Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of the judgment against them based on a jury's speculation as to motives.'

This reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damage liability regional legislators may face as a matter of state law, we hold that petitioner's federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity."

It is submitted to this Court, in light of *Lake Country Estates*, that the Circuit's holding is at variance with the *Lake Country Estates* case in that in the situation presented to this Court here, the Ordinance creating the Dallas-Fort Worth Regional Airport Board is a state-authorized action by virtue of the "Municipal Airports Act of the State of Texas", being Articles 46d-14 and 46d-15 of Vernon's Annotated Civil Statutes of the State of Texas. These two Articles are shown in the Appendix as App. L, pp. L1 thru L2. Pursuant to the provisions of those State

Statutes, the DFW Board in this case was established by the Cities of Dallas and Fort Worth, Texas as the regional governmental agency charged with legislative authority to operate and regulate the D/FW Airport.

The Federal Statutes, 42 USC 1983 and 42 USC 1988, do *not*, and *cannot*, justify the award of attorneys' fees. The reason is that in order for 1988 to become applicable, it must be shown that some person (in an executive capacity, not legislative) has, under color of ". . . ordinance . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . .". *Lake Country Estates* excludes regional legislators from the application of this Statute. *Regional legislators were the only people ever to act in the entire factual circumstances of this case and then only to adopt a Resolution.* It is shown unequivocally by the Stipulation between the Parties (App. J) that ". . . although the Resolution and the Ordinances are in effect . . ., no attempt has been made to enforce same . . ." by any person in an executive capacity. This action has simply never taken place.

In short, neither any member of the Airport Board, nor the Board itself, is liable under 1983 *(Lake Country Estates)* as legislators, nor is any one or more of the Petitioners, as executives, liable because *they took no action by agreement between the Parties.* 1988 makes the enforcement of an action under 1983 a mandatory prerequisite to liability for attorneys' fees. It is shown that *Lake Country Estates* exempts all legislative action of the Board; there was never any other action of an executive nature taken. We submit there is a sharp difference in the Circuit's Opinion in the case at bar and in *Lake Country Estates.*

It must be further noted that in any event, the portion of the attorneys' fee award made in the case at bar, but

related only to the first Krishna Case (App. H) was fundamental error in that the Krishnas did not prevail and the case was dismissed without appeal and without any separate award of attorneys' fees therein.

### d. Indispensable Parties

As stated earlier, the Trial Court overruled the Motion of Petitioners to Order the Indispensable or Necessary Joinder of the Airline Tenants who occupied the terminals. The Circuit affirmed that position, in the face of the holding in *ISKCON, et al. v. New York Port Authority, et al.*, 425 F.Supp. 68 (SDNY, 1977), stating:

> "The position of the airlines in this case is distinguishable from the airlines in *Port Authority*. Here, the D/FW Airport Board asserts its authority to impose and administer a regulatory permit system within the terminal areas under lease to the carriers. In fact, the leases governing the airlines' use of the premises contain a nonexclusivity clause through which the Board retains the right to authorize persons other than the airlines to use the premises."

Stipulation No. 5 of the Parties is as follows:

> "5. That the entire interiors of Airport terminals situated at the Dallas-Fort Worth Regional Airport are leased to commercial airline carriers at this time and have been so leased since January 13, 1974, such leases each having a term that runs beyond the year 2000 A.D. That Plaintiff's Exhibits 3, 4 and 5 at the hearing on November 15, 1977, entered into between the Dallas-Fort Worth Regional Airport Board and Braniff Airways, Incorporated, dated August 1, 1977, typifies the other leases used by the Board with all the other airline tenants in the other airport terminals."

A misstatement of fact is contained in the Circuit's and the Trial Court's Opinion in the present case regarding the

Board's actions in granting permits to Krishna and others, specifically with reference to doing so without the consent of the Lessees. The Trial Judge says:

> "The Airport Board apparently maintains enough control over the inside of the Terminal Buildings to prohibit the solicitation of charitable contributions in those areas and enforce that prohibition (Appendix A) and negotiate interim provisions for in-terminal solicitation during the pendency of this lawsuit. (SOF Ex. #1, 2)."

It was painstakingly explained to the Trial Judge and the Circuit Court that the Board was obligated to secure the approval of the Tenants in order to grant a permit to use the inside of a *terminal, and such proviso was contained in the Permit.* (App. J-5, "Schedule A".)

The Proviso says:

> "SCHEDULE A
>
> Privilege is subject to the approval of the airlines to use their leased Terminal Areas in the Passenger Emplaning and Deplaning Complex. Permittee shall meet and comply with all reasonable rules and regulations of such airlines. Permittee shall pay any and all charges assessed at the Parking Plazas."

The Airlines as Tenants agreed only to withhold objections in this matter while this suit was pending.

The Board timely made a Motion to Dismiss for failure to join the airline terminal tenants as indispensable parties, as a part of their Original Answer on April 20, 1977. This Motion was overruled by the Trial Court in its Memorandum Opinion of January 30, 1979. In that Opinion, the Trial Court attempts to distinguish the present case from *ISKCON, et al v. New York Port Authority, et al,* 425 F.

Supp. 68 (S.D. New York, 1977). This is impossible to do because the two cases are precisely on all-fours. There was certainly no impediment to ordering such joinder, and all requirements of Rule 19, Fed. R. Civ. P. were complied with.

Judge Carter, in the *Port Authority* case, *supra*, says:

"Plaintiffs argue that the Port Authority regulations govern activity on all property owned or operated by the Authority at the three airports, including property leased to private airline companies. They contend that the lease agreements between the Port Authority and the airlines provide that the rules and regulations of the Port Authority, including the regulations challenged here, shall apply to the leased premises and that the defendant was attempting to enforce these regulations when it threatened plaintiffs with arrest. Plaintiffs also maintain that the discretion vested in Port Authority officials to license the exercise of First Amendment rights has not been delegated to any of the airport lessees. Alternatively, they argue that if there has been such a delegation, no standards guide the discretion of the airport lessees; and even if there were standards, the Port Authority is without the power to delegate authority to license the exercise of First Amendment rights to private parties.

Defendant on the other hand, asserts that the airlines control spaces leased to them, not the Port Authority. Threats of arrest were made in an effort to assist the airlines in keeping plaintiffs off leased premises as loiterers, N.Y. Penal Law § 240.35(7), and not pursuant to the regulations challenged by plaintiffs.

I find the airline lessees should be joined under Rule 19(a). As I stated in *Robertson v. National Basketball Ass'n*, 389 F.Supp. 867, 878 (S.D.N.Y.1975):

'[t]he purpose of Rule 19(a) has been defined as a requirement "to bring before the court all persons whose joinder would be desirable for a just adjudication of the action...." Wright & Miller, Federal Practice and

Procedure: Civil § 1604, relating to the subject of the action and is so situated that its absence will impair its ability to protect that interest or will leave any of the parties subject to multiple or inconsistent obligations, and the risk of the latter is substantial.' (citations omitted)"

2.

In deciding whether to grant this Writ, it should be borne in mind that almost 30% of this nation's population visit airport terminals each year, either as passengers or members of passengers families, or simply as visitors. This is almost 70 million people. There are 628 airports in the United States which handle air carriers, and 142 of these are larger hubs for the Federal Government's Airport Plan. The crowded conditions of airport terminals would certainly seem to justify this Court in examining the solicitation question as it pertains to air terminals in the same manner as the Court has done with this country's state fair grounds in *Heffron*. An entire review of these questions would lend guidance to the lower Federal Courts, as well as a large segment of this country's economy, and units of local government.

## CONCLUSION

For the reasons set out above, Petitioners respectfully request that this Writ of Certiorari be granted by the Court.

Respectfully submitted,

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# Appendix

81-1685

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No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

LEONARD LEMMER, et al., Petitioners

v.

SUSAN FERNANDES, a/k/a SANTANI, et al.

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## APPENDIX A

Susan FERNANDES, a/k/a Santani, on behalf of herself and all International Society for Krishna Consciousness members, residing in Dallas, Texas, Plaintiff-Appellee,

v.

Leonard LIMMER, Dallas-Ft. Worth Regional Airport Security Chief, et al., Defendants-Appellants.

No. 79-3581.

United States Court of Appeals, Fifth Circuit.*
Unit A

Dec. 11, 1981.

Appeal from the United States District Court for the Northern District of Texas.

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal presents yet another skirmish in the ongoing struggle between the followers of the Krishna religion and governmental entities intent on regulating the dissemination of literature and the solicitation of funds in public places.[1] At issue is the constitutionality of a local ordinance govern-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

[1] In recent years federal courts have addressed frequent challenges to governmental regulations restricting Krishna devotees from practicing Sankirtan, a religious ritual involving peripatetic fund solicitation and tract distribution in public places. *See, e. g., cases collected in Heffron v. International Society for Krishna Consciousness, Inc.*, —— U.S.——, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

ing literature distribution and fund solicitation in the Dallas-Fort Worth Airport complex.[2] Ms. Fernandes, a Krishna devotee suing on behalf of the International Society for Krishna Consciousness (ISKCON) members,[3] brought this suit to enjoin enforcement of the ordinance. The district court determined that the ordinance trenched upon First Amendment rights and issued the requested injunction. We affirm.

## I. DESCRIPTION OF THE AIRPORT

The Dallas-Fort Worth Regional Airport (D/FW) has been judicially described before, *Continental Bus System, Inc. v. City of Dallas*, 386 F.Supp. 359 (N.D.Tex.1974), but this appeal necessitates a brief review of its configuration. The 18,000 acre D/FW complex sprawls across the borders of Grapevine, Euless, and Irving, municipalities lying between the cities of Dallas and Fort Worth, Texas. The airport is a major national air transportation center. It serves as a hub connecting regional air traffic as well as the departure point for air travelers in the Dallas-Fort

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[2]The relevant portions of the ordinance, formulated as a resolution by the Dallas-Fort Worth Regional Airport Board and adopted by the cities of Dallas, Fort Worth, and Grapevine, are contained in the Appendix.

[3]In an explanatory footnote appended to its memorandum opinion by an order issued September 7, 1979, the district court noted that Ms. Fernandes never pursued a motion for class certification. However, since the purported class sought no damages, a declaratory judgment and injunctive relief would be formulated identically whether the plaintiff sued individually or as a class representative. Therefore, the court deemed an inquiry into the propriety of a class action unnecessary.

Because the § 1988 attorneys' fees award was intended to compensate Ms. Fernandes' attorneys for their representation of ISKCON in the earlier, related suit challenging regulations in effect before the ordinance here at issue was enacted, and because Ms. Fernandes sued as ISKCON's representative, the complaining party in this case is interchangeably referred to as "Ms. Fernandes," "ISKCON," or "plaintiff."

Worth metropolitan area. The airport complex contains a hotel, a bank, and a variety of other commercial establishments in addition to air terminal facilities.

D/FW's four terminal buildings are crescent-shaped structures housing arrival and departure gates, airline ticketing and baggage operations, passenger waiting areas, bars, shops, and restaurants, as well as office facilities for the various airlines. Arrival and departure gates for air passengers radiate from central corridors running the length of each terminal building. The terminal buildings are connected by a light rail shuttle system. Thus, while passengers initiating their flights at D/FW must enter the terminal buildings through exterior doors, it is possible for air travelers making a connecting flight at D/FW[4] to deplane and proceed to their departure gate in another terminal building without leaving the confines of the terminal system.

[1] D/FW is jointly owned by the cities of Dallas and Fort Worth and operated by the Regional Airport Board. The Board, which employs a police force to maintain security in the airport complex, formulated the ordinance at issue in this appeal and is responsible for its administration and enforcement. Violations of the ordinance would be prosecuted through the municipal courts of Grapevine, Texas. Therefore, the plaintiff has selected the airport security chief and Grapevine law enforcement officials, all of whom are D/FW Board members, as named defendants in this declaratory judgment action to invalidate the ordinance. Her selection of defendants is appropriate. *See International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 818—19 (5th Cir. 1979) (aspects of ISKCON suit challenging Atlanta airport regulations held justiciable when mounted against officials responsible for airport law enforcement).

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[4]Although current data on the ratio of transfer passengers to passengers initiating or terminating flights at D/FW was unavailable at the time this case was orally argued, correspondence between the parties on the Record indicates that 55 percent of D/FW passenger traffic transfers at the airport.

This controversy first erupted in late 1974 when ISKCON members were arrested by D/FW police for soliciting funds, selling merchandise, and distributing literature in the terminal buildings without a permit in violation of airport regulations. ISKCON promptly sued to invalidate the regulations and enjoin their enforcement. The district court refused to issue a preliminary injunction, *ISKCON v. Dallas-Fort Worth Regional Airport Board*, 391 F.Supp. 606 (N.D.Tex. 1975), but dismissed the suit before ruling on the merits when the Board modified the regulations by enacting the ordinance at bar.

The Board's adoption of the modified ordinance prompted the filing of this law suit. Ms. Fernandes' complaint rests on the contention that the D/FW terminal buildings are public forums, where governmental restraints on the free exercise of speech and religious liberty must pass constitutional scrutiny. She challenges the ordinance on grounds of unconstitutional vagueness, overbreadth, prior restraint upon free speech, and infringement on free exercise or religious liberty.

The case was tried in the district court on testimony, stipulated facts, trial briefs, and documentary exhibits. In a memorandum opinion, 465 F.Supp. 493 (N.D.Tex.1979), the trial judge found for the plaintiff, invalidating the ordinance and enjoining its enforcement. The court further determined that under 42 U.S.C. § 1988 the plaintiff was entitled to attorneys' fees incurred in the successful litigation of this matter. Applying the *Johnson v. Georgia Highway Express, Inc.*[4] criteria, the court awarded attorneys' fees against the defendants in their official capacities. On appeal, the D/FW officials dispute the trial court's determinations on: (1) the status of the terminal buildings as public forums; (2) the merits of ISKCON's challenge to the facial constitutionality of the ordinance; (3) the necessity of joining the airport's lessees as indispensable parties; and (4) the attorneys' fees award. We review these arguments individually.

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[4]488 F.2d 714 (5th Cir. 1974).

## II. JUSTICIABILITY AND STANDING

Before proceeding to the defendants' argument over the characterization of the airport as a public forum and to ISKCON's constitutional challenge on the merits, we are obliged to identify the justiciable issues presented in this case. Our task is complicated by the anticipatory nature of this action for declaratory relief; no ISKCON permit application has been denied under the terms of the ordinance.

[2] In *ISKCON v. Eaves*, 601 F.2d at 817—19, our Court gave detailed consideration as to whether there was an Article III controversy in a similar facial challenge to the Atlanta airport ordinance regulating ISKCON's activities. Noting the widespread judicial acceptance of anticipatory suits by active members of organizations with "goals apart from the extirpation of unconstitutional measures," *id.* at 819, Judge Goldberg, for the panel, determined that the Atlanta plaintiffs demonstrated the requisite concrete and definite interest in challenging the ordinance through threatened disobedience. Ms. Fernandes demonstrates that same degree of concrete adversity here.

[3] Ms. Fernandes first challenges § 4A(c) of the ordinance which states the conditions under which a solicitation permit may be denied. Specifically, she alleges that this section constitutes a prior restraint upon First Amendment freedoms because of its lack of *Freedman*[6] procedural safeguards as well as its broad grant of discretion to the Executive Director in granting or denying a permit. Defendants

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[6] *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In *Freedman* the Supreme Court held that Maryland's motion picture censorship statute unconstitutionally infringed on the First Amendment rights of exhibitors because it lacked the following procedural safeguards: (1) a requirement that the state initiate judicial action to restrain exhibition of the challenged film and bear the burden of proof in the judicial proceeding; (2) an assurance that the exhibitor will not be delayed from exhibiting the film while the state seeks protracted judicial review; and (3) a requirement that judicial review will be prompt. *Id.* at 59-60, 85 S.Ct. at 739-740.

argue that because plaintiff has neither applied for nor been refused a permit, she lacks standing to challenge this provision.

[4, 5] Defendants' objection to standing is not supported in the law. It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); *ISKCON v. Eaves*, 601 F.2d at 823. *See also Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976). A court may invalidate an excessively broad grant of discretion on its face, without regard to the particular facts of the plaintiff's case, because the very existence of the discretion lodged in the public official is constitutionally unacceptable. *ISKCON v. Eaves*, 601 F.2d at 823.

[6-8] Plaintiff has standing to support other challenges as well. She may assert an overbreadth challenge to § 4A(h)(1), which regulates the location in which solicitation is permitted, notwithstanding the fact she has not violated that section. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13, 93 S.Ct. 2908, 2915-2917, 37 L.Ed.2d 830 (1973). Likewise, plaintiff's grievance against the restraint on religious freedom imposed by the fee requirement in § 4A(f) is also justiciable although the case is in an anticipatory posture. *See Flast v. Cohen*, 392 U.S. 83, 104 n.25, 88 S.Ct. 1942, 1954 n.25, 20 L.Ed.2d 947 (1968). Plaintiff also has standing to mount vagueness challenges to §§ 4A(h)(4)(hh) and (ii) relating to obstructing entrances, stairways, and baggage areas, because she is entitled to fair warning as to what conduct the ordinance seeks to prohibit. *ISKCON v. Eaves*, 601 F.2d at 820-23.

[9] Plaintiff's challenge to § 4A(h)(4)(gg), which governs the cancellation or reassignment of a permit already granted, evokes a different conclusion. In *ISKCON v. Eaves*, we held that a challenge to a similar provision was inappropriate because the possibility that the defects allegedly contained therein would affect an applicant who did not yet

have a permit was merely contingent. 601 F.2d at 825. This contingency, coupled with the anticipatory posture of the entire proceeding, compels us to conclude that ISKCON's challenge to § 4A(h)(gg) is not at this time justiciable.

[10] Counsel for the defendants asked at oral argument for detailed guidance in drafting constitutionally sound regulations in this delicate area. We appreciate counsel's quandary. Nevertheless, as an Article III court, our legislative impulses must be constrained by the scope of the controversy before us and a deferential respect for our limited judicial role. The foregoing features of the D/FW ordinance are the only matters properly before us on this appeal from ISKCON's anticipatory challenge.

## III. PUBLIC FORUM

We turn now to D/FW's claim that the airport ought not be regarded as a public forum. It is now generally well established that airport terminals owned and administered by governmental entities are public forums in which efforts to regulate speech or religious activity must comport with First Amendment guarantees. *ISKCON v. Eaves, supra; ISKCON v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973). Nevertheless, the defendants insist that the D/FW passenger terminals are not public forums. Defendants advance two arguments to support this contention. First, defendants state that the unique shape of the D/FW terminals renders the airport an inappropriate place for the expressive activities otherwise permitted in public forums. The terminals are narrow and crescent-shaped, crowded with thousands of travelers rushing to meet their flights. To allow solicitation within these passageways, argue defendants, would impede unduly the flow of the purposeful pedestrian traffic of the airport terminals.

[11] While we accept D/FW's general description of the terminals, we cannot conclude that the interior of the termi-

nals is not, at least partly, a public forum. To determine whether a particular place is a public forum we have held that inquiry involving the following factors is relevant:

> does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance[?]

*Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1019 (5th Cir. 1972), quoting *Wolin v. Port Authority of New York*, 392 F.2d 83, 89 (2d Cir. 1968), *cert. denied*, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968). Applying these criteria to D/FW, we find that the interior of the terminals contains areas which are public forums. That the passageways are crowded and narrow does not defeat this conclusion; rather, such factors go the reasonableness of the time, place, and manner restrictions imposed on persons exercising First Amendment rights in the forum. We sympathize with D/FW in its proper insistence on keeping terminal traffic free-flowing; however, this reason is not sufficiently compelling to justify the total exclusion of those wishing to exercise free speech and freedom of religion within the terminals.

[12] Appellants also argue that even if D/FW's status as an airport makes it a public forum, the fact that it has leased every square foot to private air carriers takes it out of the public forum mold. This contention is not supported in the law.

[13] The analogy posited by the defendants between the terminal buildings and shopping centers, where restrictions on the exercise of free speech rights in privately-owned commercial enclaves have been approved, *see Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), is inapt. Despite the leaseholds of the air carriers, ownership of the airport remains in the munici-

pal governments. Moreover, the existence of a leasehold by a private party on public property does not remove from the realm of state action restrictions on the exercise of civil rights at the site. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924, 77 S.Ct. 680, 1 L.Ed.2d 719 (1957).

[14] Of course, we do not imply that governmental ownership of a facility guarantees the public absolute and unrestricted access for the purpose of exercising First Amendment liberties. *See Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (upholding ban on political campaigning in military enclave); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) (upholding application of trespass statute to bar demonstrations at a jail). Absent significant governmental interests justifying reasonable time, place, and manner restrictions, however, government-owned facilities generally must be made available for the exercise of First Amendment liberties. *Cox v. New Hampshire*, 312 U.S. 569, 575-76, 61 S.Ct. 762, 765-766, 85 L.Ed. 1049 (1941). As Justice Roberts observed in *Hague v. C. I. O.*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939), the right to communicate in a public forum "may be regulated in the interests of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

[15] In finding the airport to be a public forum we do not hold that every area within the terminals is public. As the district court noted, 465 F.Supp. at 501, those parts of the terminals restricted to airline personnel are private, absent unusual circumstances. Likewise, the arrival and departure gates, where only ticketed passengers may go, are not public forums. The parallel between public streets and the crescent-shaped central concourses of the D/FW terminal buildings, where air travelers as well as the general public may shop, dine, imbibe, and sightsee, is clear and powerful, however.

The analogy between these terminal concourses and public streets is further strengthened by the lack of restrictions on public access to the commercial establishments located along the crescent-shaped passageways, whether or not persons must pass through security check points first. It is true that ground access to the terminal buildings themselves is constrained by the toll gates at the fenced perimeter surrounding the airport complex, but as with other public facilities, this restriction does not preclude characterization of the terminal buildings as public forums[7] because *any* person who pays the toll may enter through these portals.

[16] In view of the lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses, we agree with the conclusion of the district court that the D/FW terminal buildings must be treated as public forums.

## IV. THE FACIAL CHALLENGE TO THE ORDINANCE

### A. THE PERMIT SYSTEM

[17, 18] D/FW's content-neutral permit system has little in common with the classic prior restraint thought to be the inspiration for the First Amendment. *See Near v. Minnesota*, 283 U.S. 697, 713, 51 S.Ct. 625, 630, 75 L.Ed. 1357 (1931) (discussing the reaction to the English licensing system restricting the publication of literature pending governmental review of its content). *See also* Emerson, *The Doctrine of Prior Restraint*, 20 J. LAW & CONTEMP. PROB. 648 (1955). Nevertheless, prior restraint doctrine has been invoked to strike down contest-neutral permit systems that regulate protected First Amendment activities. E. g., *Shuttlesworth v. City of Birmingham, supra; Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900,

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[7] We note in passing that ground access to Manhattan Island is similarly restricted. We hardly think that bridge and tunnel toll booths take New York City's streets out of the realm of public forums.

84 L.Ed. 1213 (1940); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). These cases teach that governmental authorities may not, except in demanding circumstances, deny access to a public forum in anticipation of consequences that may flow from the contemplated activity. Punishment for criminal behavior must be government's response to an abuse of the privilege to use a public forum; prospective restraints are unconstitutional.

*1. Procedural safeguards*

Ms. Fernandes charges that the permit system contained in §§ 4A(b) and (c) is unconstitutional because it lacks the procedural safeguards required by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The ordinance's lack of procedural safeguards assuring prompt judicial review of permit refusals presents a prior restraint problem. In *Freedman v. Maryland*, the Supreme Court prescribed standards for expedited judicial review governing a state motion picture licensing board's content-sensitive regulation of films. *See* n.5, *supra*. Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman:* to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights. Therefore, "[t]he *Freedman* principle is applicable here." *Shuttlesworth v. Birmingham*, 394 U.S. at 162, 89 S.Ct. at 944 (Harlan, J., concurring) (*Freedman* procedural safeguards apply to content-neutral municipal parade permit ordinance). *Accord, Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

The lack of these procedural protections in this licensing system means that the opportunity to exercise free speech and other associational rights can be postponed for substantial periods of time before adequate review. These deficiencies can be eliminated in an effective and functioning ordinance as the Atlanta case shows. *ISKCON v. Eaves, supra.*

One may construe §§ 4A(b) and (c) of the D/FW ordinance to mean that the Board will act upon permit applications within three days. The district court, however, correctly found that these provisions imposed no time limits on the Board's consideration of a permit application. 465 F.Supp. at 502. It is clear from the terms of the ordinance that a decision within three days is not compelled. And while § 4A(i) of the D/FW ordinance establishes an administrative appeal mechanism, the ordinance does not require: (1) the Board to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested permit; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3) a guarantee of swift, final judicial action.

[19] The Atlanta airport ordinance governing charitable solicitation and literature distribution recently reviewed by our Court incorporated the *Freedman* procedural safeguards. *See ISKCON v. Eaves*, 601 F.2d at 834-35 (Atlanta Airport Ordinance §§ 4, 4A). We agree with the district court's determination that the lack of these safeguards in the ordinance at bar renders D/FW's permit system constitutionally deficient.

2. *Discretion in the Executive Director*

Plaintiff also alleges that § 4A(c) is unconstitutional because of defects in the five standards contained therein which are intended to guide the Executive Director of the airport in his determination of when permits should be denied. We address the constitutionality of these subsections individually.

*§ 4A(c)(1)*

[20] Section 4A(c)(1) authorizes the denial of a permit if "one or more of the statements in the Application is not true." ISKCON argues that this section is unconstitutional because it conditions the granting of a permit on the content — truth or falsity — of the applicant's speech. ISKCON

simply misconstrues this section. A permit may be denied for the falsity of statements *in the application*, not for the falsity of the ideas the applicant wishes to disseminate. Since gaining relevant information as to the applicant is proper, the falsification of such information is not constitutionally privileged.[8]

*§ 4A(c)(2)*

This section authorizes permit denial if the applicant or any person who will participate in the activities "is presently or has been engaged in a fraudulent transaction or enterprise, or has been convicted of a felony or other offense involving moral turpitude." ISKCON objects that by these words the Board has been vested with unlimited discretion to determine if the applicant's activities are or have been fraudulent. This provision sanctions the denial of a permit also on the basis of his or her past conduct. We deal with these issues separately.

*(a) fraudulent transactions*

[21] While we recognize the Board's legitimate interest in preventing fraud, we cannot find this provision to be an appropriate manner for doing so. Under its terms, the Board is empowered to deny a permit based upon its opinion as to the legitimacy of the applicant's organization. The Director of the Board is given no guidance as to how such determinations are to be made. The unbridled discretion of a licensor in determining the legitimacy of an organization was condemned by the Supreme Court in *Cantwell v. Connecticut*, 310 U.S. at 307, 60 S.Ct. at 904, when it struck down an ordinance permitting a state official to grant or deny a solicitation license based on whether or not, in his opinion, the cause was religious. Although recognizing the possibility that fraudulent appeals could be made in the name of religion,

[8] ISKCON states that if § 4A(b), which details the information an application must contain, is vague, an applicant cannot be denied a permit for answering falsely because it is impossible to know what information the application is supposed to contain. We do not find that any of the § 4A(b) requirements are vague, however.

the Court held in *Schneider v. State*, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155 (1939), that "a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to [officials] for their consideration and approval...." There are other means, such as penal laws, to prevent and punish frauds without intruding on the First Amendment freedoms:

> Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated ... and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

*Id.* at 164, 60 S.Ct. at 152. We conclude that this standard violates First Amendment freedoms.

*(b) past convictions*

[22] This section authorizes the Board to deny an applicant total access to the airport grounds if he has been convicted of a felony or other offense involving moral turpitude. To sustain such a total abrogation of First Amendment rights, the government must show that the speech prohibited will "surely result in direct, immediate and irreparable damage...." *New York Times Co. v. United States*, 403 U.S. 713, 730, 91 S.Ct. 2140, 2149, 29 L.Ed.2d 822 (1971) (Stewart, J., concurring). That the applicant has been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the future. *See ISKCON v. Eaves*, 601 F.2d at 833, and our discussion of § 4A(c)(5) of this ordinance, *infra*.

It is true that persons convicted of crimes suffer collateral consequences for the rest of their lives. They may not hold public office, serve as jurors, or join the army. These exclusions, however, involve the employment of felons in sensitive areas of public importance. In *DeVeau v. Braisted*, 363

U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960), the Supreme Court upheld a bi-state statute excluding felons from becoming officers of labor unions because of the voluminous concrete evidence proving the danger of allowing felons to control unions. "New York was not guessing or indulging in any assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive if mortifying evidence...." *Id.* at 159-60, 80 S.Ct. at 1154. D/FW has not shown any "impressive" evidence to sustain this provision; as far as the record shows, it is merely "indulging in assumptions." Persons with prior criminal records are not First Amendment outcasts. Thus, this provision of the ordinance is unconstitutional.

*§ 4A(c)(3)*

Section 4A(c)(3) authorizes denial of a permit to a "charitable organization"* if its "expected cost of solicitation will be excessive in relation to the gross amount to be collected." The subsection goes on to establish a presumption that solicitation costs totaling more than 25 percent of the gross receipts are excessive. To ensure compliance with this provision, D/FW auditors are empowered to scrutinize all financial records of permit holders and applicants.

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the Supreme Court invalidated as facially overbroad a local ordinance prohibiting door-to-door canvassing by charitable groups whose solicitation costs exceeded 25 percent of receipts. The Court acknowledged the legitimacy of the Village's interests in regulating fraudulent, dangerous, or annoying solicitation. *Id.* at 636-37, 100 S.Ct. at 836. Nevertheless, the Court struck down the ordinance's cost-effectiveness requirement on the ground that it was not sufficiently related to those legitimate aims so as to justify its infringement on the solicitor's First Amendment liberties. *Id.* at 636-38, 100 S.Ct. at 836-837.

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*Section 4A(a)(1) defines charitable organization to include religious societies, sects, groups, and orders.

D/FW seeks to distinguish its permit system from the Village of Schaumburg's by emphasizing that its cost-effectiveness standard is a rebuttable presumption akin to the provision upheld in *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684 (1970). *See Village of Schaumburg*, 444 U.S. at 635 n.9, 100 S.Ct. at 835 n.9. The ordinance in *National Foundation* specifically excluded religious groups such as the Krishnas from the cost-effectiveness requirement, however. In upholding the ordinance, this Court noted that "[a] fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations." 415 F.2d at 46.

The fact that the D/FW ordinance percentage limitation consists of a rebuttable presumption does not save it from constitutional deficiency in light of *Schaumburg*. The rebuttable nature of the presumption undoubtedly narrows the sweep of the ban on solicitation efforts that are extraordinarily costly in relation to their results. Yet, to pass constitutional muster, the cost-effectiveness requirement must make "a substantial enough contribution to some combination of important governmental ends to outweigh its restrictive effect on First Amendment freedoms." *ISKCON v. Eaves*, 601 F.2d at 829 (emphasis omitted).

We concede the legitimacy and the importance of D/FW's asserted objectives in promulgating this regulation. Nevertheless, we question the relation between these objectives and the cost-effectiveness standard prescribed in § 4A(c)(3). The realm of religious and charitable organizations, as Justice White noted in *Village of Schaumburg*, *supra*, includes groups whose unorthodox messages will inevitably yield less cost-effective solicitation results. May D/FW premise the simultaneous admission of, for example, evangelical Baptists and the exclusion of Krishna devotees on the results of their fund solicitation efforts? We think not.

It is relevant also to recognize that this provision of the ordinance subjects a religious organization which wishes to

solicit to a complete financial audit. Conceivably it authorizes a national audit of the books of such organizations to enable an accurate 25 percent level evaluation. If a religious belief calls for proselytizing which returns only 70¢ or 50¢ or 30¢ on the dollar, as long as the action is in good faith in the belief that souls are being saved, how can society conclude that these activities are "excessive?" The First Amendment says we do not question such good faith religious commitments. *United States v. Ballard*, 332 U.S. 78, 87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944).

[23] While subsection 4A(c)(3) holds open the promise that unpopular religious minorities might gain access to the D/FW forum through administrative grace, it still imposes a cost-effectiveness evaluation on the free exercise rights of religious minorities which cannot be justified. Section 4A(c)(3)'s cost-effectiveness standard is not sufficiently tailored to serve D/FW's interests in protecting against fraudulent or annoying solicitation to justify the resulting imposition on First Amendment rights.[10]

*§ 4A(c)(4)*

[24] This section authorizes the Executive Director to deny a permit "when there is good reason to believe that the granting of the permit will result in a direct and immediate danger or hazard to the public security, health, safety or welfare." ISKCON contends that this provision is unconstitutional because it gives the Executive Director excessive discretion in deciding whether the granting of the permit will be detrimental to the public interest.

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[10]In disposing of ISKCON's challenge to § 4A(c)(3) on overbreadth grounds, we need not reach the issues, decided by the trial court, of the provision's validity under the "excessive entanglement" prong of the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

In *Shuttlesworth v. City of Birmingham, supra,* the Supreme Court invalidated a municipal ordinance that empowered a public official to deny a parade permit if, in his opinion, the proposed parade would be detrimental to the "public welfare, peace, safety, health, decency, good order, morals or convenience." *Id.* 394 U.S. at 149, 89 S.Ct. at 938. The use of public streets cannot be conditioned upon an official's opinion as to the harmful consequences that might result. *Id.* at 153, 89 S.Ct. at 940. *Accord Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Staub v. City of Baxley, supra.* Discretion in public officials must be narrowly circumscribed. "[A] municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to ... parade according to their own opinions regarding the potential effect of the activity in question...." *Shuttlesworth,* 394 U.S. at 153, 89 S.Ct. at 940.

We agree with the district court's conclusion that the standard of "good reason" is indefinite and does not comport with the constitutional requirement that discretion in public officials be specifically and narrowly circumscribed. A before-the-fact determination as to the harmful consequences of an applicant's speech is by this ordinance made a subjective judgment call in the total discretion of the Director. This type of unbridled discretion has been condemned time and time again by the Supreme Court.

A narrowly drawn statute authorizing the official to grant or deny a permit based on narrow criteria related to the proper regulation of public places would pass constitutional muster. *See, e. g., Cox v. New Hampshire, supra* (upholding permit system which sanctioned denial of permit if proposed activity would interfere with the public convenience to use the city streets). This provision is not so narrowly drawn. Accordingly, we find § 4A(c)(4) unconstitutional.

*§4A(c)(5)*

[25] Subsection 4A(c)(5) authorizes permit denial on the ground that "the Applicant or any agent or representa-

tive of the Applicant . . . has previously violated . . . Regulations of the Dallas-Fort Worth Regional Airport Board, or has violated any of the terms and provisions of any prior Permit."

Denial of a permit for prior violations unquestionably entails a total abridgement of a citizen's right to use the forum provided at the D/FW airport. *Compare Kunz v. New York, supra* (denial of permit application for public worship based on disorders caused by prior worship meetings held by applicant constitutes improper censorship). The First Amendment restricts such abridgement unless the government can show that the speech prohibited will "surely result in direct, immediate, and irreparable damage...." *New York Times Co. v. United States*, 403 U.S. at 730, 91 S.Ct. at 2149 (Stewart, J., concurring). D/FW's attempt to meet this burden amounts to a refrain of the generalization this Court capsulized aptly: "once a sinner, always a sinner." *ISKCON v. Eaves*, 601 F.2d at 833. Our Circuit has twice in recent years rejected this prior misconduct justification for a permit denial. *Id.; Universal Amusement Co. v. Vance*, 587 F.2d 159, 65-66 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). Today, we reject it a third time. Subsection 4A(c)(5) imposes an unconstitutional prior restraint.

B. § 4A(f)'s $6.00 FEE REQUIREMENT

Under its permit system, the airport undertakes to exact a $6.00 daily fee from all permittees to be used in defraying the costs incurred by the Board in investigation and preparation of the permit and subsequent supervision. ISKCON contends that the fee constitutes a tax on their exercise of First Amendment freedoms.

[26] Exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Jones v. City of Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444,

80 L.Ed. 660 (1936) (tax on newspapers based on amount of circulation violates First Amendment). Were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. "[F]reedom of speech ... [must be] available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, at 111, 63 S.Ct. 870, at 874, 87 L.Ed. 1292. *See also Carolina Action v. Pickard*, 465 F.Supp. 576, 580-81 (W.D.N.C.1979).

In *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), the Supreme Court reversed the convictions of eight Jehovah's Witnesses who were arrested for selling religious tracts door-to-door without a license in Jeanette, Pennsylvania. A Jeanette municipal ordinance required colporteurs to obtain a license from the city and pay $1.50 per day licensing fee. Justice Douglas, writing for the Court, characterized the $1.50 exaction as "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." 319 U.S. at 113, 63 S.Ct. at 875. Such a tax, the Court held, was an unconstitutional restriction on the free exercise of religious belief.

The district court, relying on *Murdock* and *Hull v. Petrillo*, 439 F.2d 1184 (2d Cir. 1971) (reversing the dismissal of a suit by Black Panther Party members challenging a municipal ordinance imposing a $15.00 per year fee on newspaper street vendors), struck down § 4A(f)'s $6.00 per day permit application fee. On appeal, the defendants seeks to characterize the $6.00 fee as a permissible regulatory levy devoted to defraying the cost of the permit system, as opposed to a tax on First Amendment activity. *See, e. g., South Carolina Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185-188, 58 S.Ct. 510, 513-515, 82 L.Ed. 734 (1938).

[27] A licensing fee to be used in defraying administrative costs is permissible, *Cox v. New Hampshire, supra*, but only to the extent that the fees are necessary. *Moffett v. Killian*, 360 F.Supp. 228, 231-32 (D.Conn.1973) (invalidating fee imposed for legislative lobbying when in excess of costs of

administration); *NAACP v. City of Chester*, 253 F.Supp. 707 (E.D.Pa.1966) (invalidating $25.00 fee for use of a sound truck when defendant did not submit evidence justifying permit fee on the basis of administrative cost).

[28] We recognize that distinguishing a proper "cost of regulation fee" from an impermissible "flat license tax" is a slippery process. The parallels between the $6.00 D/FW permit fee and the *Murdock* tax, however, are extremely strong. The Murdock ordinance imposed an exaction, moderate in amount, on the privilege of using a public forum for constitutionally protected purposes and so does the D/FW ordinance. In *Murdock*, the governmental body did not demonstrate a link between the fee and the costs of the licensing process, nor has D/FW done so in this case.[11] *See NAACP v. City of Chester, supra.* The *Murdock* ordinance conditioned free exercise rights on a colporteur's willingness and ability to pay, and so does the D/FW ordinance. On the basis of the overwhelming similarities between this provision and the ill-fated licensing tax reviewed in *Murdock*, and the absence of a restriction on the uses of the fee for covering the costs of regulation, we affirm the district court's holding that § 4A(f) is an unconstitutional limitation upon rights guaranteed by the free exercise clause.

C. THE OVERBREADTH CHALLENGE TO § 4A(h)(1)

[29] ISKCON argues that D/FW's blanket prohibition of solicitation and distribution inside the terminal buildings is overbroad because it unduly restricts the First Amendment activity within a public forum. We agree.

[30-32] The federal courts may not strike down statutes as facially overbroad unless their defectiveness is substantial, "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 615, 93 S.Ct. at 2918. We

[11] Of course, the anticipatory nature of this litigation has precluded D/FW from making such a showing. While its claim is superficially plausible, D/FW has not offered any support for its contention that the $6.00 fee is needed to defray the costs of operating the permit system.

find that § 4A(h)(1)'s defects are substantial. Governmental restrictions on the exercise of First Amendment freedoms in public forums must be limited in scope to reasonable time, place, and manner regulations. *Cox v. New Hampshire*, 312 U.S. at 575-76, 61 S.Ct. at 765-766. Such restrictions must be justified by "weighty reasons." *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). Carefully tailored restraints designed to further legitimate governmental interests in preserving the forum for the normal pattern of activities conducted there are constitutionally acceptable. An outright ban on the use of the forum for expressive purposes, on the other hand, can seldom, if ever, be justified. *Hague v. C. I. O.*, 307 U.S. at 516, 59 S.Ct. at 964.

By forbidding absolutely the exercise of speech and religious liberties within the terminal buildings, the D/FW ordinance sweeps substantially beyond the ambit of permissible regulation. *Cantwell v. Connecticut*, 310 U.S. at 304, 60 S.Ct. at 903. In so holding, we do not imply that the entire area within the terminal buildings is a public forum; preservation of the private character of certain terminal areas justifies restrictions as to those areas. See discussion in Part III, *supra*. Similarly, governmental interests in preserving D/FW's usefulness as an air passenger and baggage terminal can support regulations that assure the unimpeded flow of passengers and airline employees through the terminal buildings. D/FW's effort to exclude entirely Sankirtan practitioners from within the terminal buildings, however, is an unconstitutionally overbroad regulation.

The Airport Board argues that the recent Supreme Court case of *Heffron v. ISKCON*, ——U.S.——, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), mandates a contrary conclusion. But this contention rests upon a misinterpretation of that case. *Heffron* concerned a challenge by ISKCON to a Minnesota Agricultural Society rule regulating the place and manner of distribution, sales, and solicitation at a state fair. The rule required that anyone desiring to sell, exhibit, or distribute materials must do so from booths which could be rented on a first come, first served basis. ISKCON did not challenge the

booth allocation process or the rental fee; its sole complaint was that the requirement that such activities be conducted only at fixed locations unduly restricted its members' exercise of First Amendment rights in a public forum. As a justification for the restriction, the Society stressed the need to maintain the orderly movement of the patrons in a small, congested area.

The Court found that the Society's rule was a reasonable regulation narrowly tailored to serve a substantial state interest. In so holding, the Court stressed two factors. First, the "special attributes" of a fair, *i. e.*, its temporariness, large crowds, and small area, necessitated such regulations to prevent widespread disorder. Id., 101 S.Ct. at 2565. Second, the rule did not deny complete access to the fairground and did provide ISKCON with reasonable and adequate means to sell and solicit on the fairground. *Id.* at 2565.

We find two crucial distinctions between *Heffron* and the case at bar. First, the "special attributes" of two differing forums make regulations that would be reasonable in one not necessarily reasonable in the other. The Minnesota fairground is "a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views...." *Id.* at 2567. The fairground is "a relatively small area of 125 acres, the bulk of which is covered by permanent buildings, temporary structures, parking lots, and connecting thoroughfares," attracting crowds of 160,000 on weekends. *Id. at* 2565. The Minnesota Society's interest in efficient operation of the fair and crowd control is acute in this setting.

The airport, on the other hand, is not "limited" in the same ways. It is a permanent, on-going concern, and its directors are not subject to the same pressures as is the Society in formulating short-lived, expedient regulations to ensure order. The airport includes four large terminal buildings and serves 70,000 travelers each day. Certain areas of the terminals may be as crowded as the fairground in *Heffron;* however, the D/FW Board has not shown which, if any, areas are so congested. The regulation prohibiting access to the

entire terminal area is overbroad to the extent that it covers areas in which the Board's interest in pedestrian traffic control has not been shown to be substantial. The record in this case, unlike the record in *Heffron*, does not justify this broad denial of access to the forum.

A second distinction between the two cases is that the Society, unlike the D/FW Board, did provide a reasonable means of access to the forum: the Minnesota Krishnas could have applied for a booth within the fairground. In their complaint, the Krishnas did not challenge the method of booth allocation or the fee charged to those who used booths. Their sole claim was that they should be permitted to carry on their activities freely anywhere within the fairground. In the present case, ISKCON does not assert an unqualified right to solicit and distribute literature anywhere inside the airport; it contests the complete denial of access to the forum. It does not suggest that regulations within the terminals would be impermissible.

D/FW suggests that ISKCON does have access to the forum because it can obtain a permit to solicit and distribute literature on the sidewalks abutting the terminals. To support this contention, D/FW relies on the Court's conclusion in *Heffron* that the availability of rental booths within the fairground constitutes reasonable access to the forum. The reliance is sorely misplaced, however. First, ISKCON may not have access to even the sidewalks without first obtaining a permit through a process which we have determined is partially flawed. In *Heffron*, booths were rented on a first come, first served basis. Second, access to the sidewalks is far from a reasonable alternative for ISKCON. The record shows that more than half of the patrons of D/FW are transfer travelers who never come into contact with the sidewalks; they either transfer to gates within one terminal or transfer to another terminal by means of the light rail tram. In *Heffron*, the alternative of booth rental was reasonable because the booths were "located within the area of the fairgrounds where visitors are expected, and indeed encouraged, to pass." *Id.* at 2568 n.16.[12]

We conclude that the blanket prohibition of § 4A(h)(1) is unconstitutionally overbroad.

## D. VAGUENESS CHALLENGES TO §§ 4A(h)(4)(hh) and (ii)

ISKCON complains that certain provisions of the D/FW ordinance do not give fair warning of the conduct they purport to proscribe. In the words of the Supreme Court, a statute is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application..." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). Because this variety of statutory imprecision encourages self-censorship, *see Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322, 12 L.Ed.2d 377 (1964), it is vulnerable to facial attack. *ISKCON v. Eaves*, 601 F.2d at 820-23.

In a September 28, 1979 order, the district court revised its earlier published opinion in light of our Circuit's detailed consideration of related issues in *ISKCON v. Eaves*. Reversing its earlier stand, the district court determined that § 4A(h)(4)(hh)'s prohibition on "interfere[nce]" with or "obstruct[ion]" of people moving through the airport was not unconstitutionally overbroad. The trial court held, however, that "the phrase ... referring to the impediment of

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[12]In its brief, D/FW asserts, without elaboration, that the availability of leased space within the terminals has never been questioned. If we assume that D/FW is offering leased space as an alternative form of access to the terminals, our conclusion is unchanged. We believe the prospect of leasing commercial space in an international airport is not a reasonable accommodation of First Amendment rights. The reasonableness of the booth rental fee in *Heffron in and of itself* was not contested by the Minnesota Krishnas. The availability of the booths as an *uncontested* alternative made the prohibition of activity other than in the booths a reasonable regulation. Because we cannot sustain even a $6.00 permit fee, *see* discussion in Part IV B *supra*, we certainly cannot conclude that the prospect of leasing commercial space within the terminal, which costs far more than $6.00, is a viable alternative that would make the prohibition of § 4A(h)(1) a reasonable regulation.

the flow of pedestrian traffic (*i. e.*, § 4A(h) (4) (ii)) is still unconstitutionally vague...."

[33] We find that neither provision is facially invalid. In contrast to the Atlanta airport ordinance provision struck down for vagueness in *ISKCON v. Eaves*, — a prohibition on interference with the undefined "conduct of any authorized business at the airport"—D/FW ordinance subsections 4A(h) (4) (hh) and (ii) define clearly the activities they protect from interference by solicitors: pedestrian passage along sidewalks, through entrances and exits, to baggage collection and claims areas, and vehicle loading and unloading. Would-be solicitors receive fair warning of the conduct proscribed in subsections (hh) and (ii). "[W]e can never expect mathematical certainty from our language." *ISKCON v. Eaves*, 601 F.2d at 830, quoting *Grayned v. City of Rockford*, 408 U.S. at 110, 92 S.Ct. at 2300. The minimal ambiguity presented in §§ 4A(h) (4) (hh) & (ii) is well within constitutional limits and we find these provisions of the ordinance constitutional.

## V. INDISPENSABLE PARTIES

[34] Defendants attack the district court's refusal to dismiss the case for failure to join the airline lessees as indispensable parties under Fed.R.Civ.P. 19. In support of this attack, defendants cite the district court opinion in *ISKCON v. New York Port Authority*, 425 F.Supp. 681 (S.D. N.Y. 1977), in which ISKCON's challenge to the Port Authority's pamphleteering solicitation regulations was dismissed, in part, for failure to join the carriers with leasehold interests in the air terminal buildings. D/FW contends that because the airlines' rights as lessess will be affected substantially by the judgment their absence in this litigation is grounds for dismissal.

[35] Courts confronted with motions to dismiss a suit for failure to join purportedly "indispensable parties" properly approach the problem pragmatically. *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970). Where, as here, it is

possible to resolve the dispute without adversely affecting the interests of the absent parties, the district court should not dismiss the case. See *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70, 57 S.Ct. 51, 53, 81 L.Ed. 42 (1936); 7 C. Wright & A. Miller, Fed. Practice and Procedure § 1602 at 22-23 & n.56 (1972).

The position of the airlines in this case is distinguishable from the airlines in *Port Authority*. Here, the D/FW Airport Board asserts its authority to impose and administer a regulatory permit system within the terminal areas under lease to the carriers. In fact, the leases governing the airlines' use of the premises contain a nonexclusivity clause through which the Board retains the right to authorize persons other than the airlines to use the premises. Furthermore, the airlines themselves do not believe that they will be affected by this litigation. The district court invited the airlines to join the litigation, but they refused the invitation. The airlines' decision, of course, is not dispositive of this issue; however, it strengthens our conclusion that their absence is not a fatal blow to jurisdiction.

D/FW has offered no other reason, *i. e.*, repercussions between itself and the lessees, on which this court might base a dismissal under Rule 19. The controversy between ISKCON and the Board over regulations which the Board has power to enforce within the D/FW terminal buildings may be adjudicated without impairing the carriers' leasehold rights. The district court's judgment did not adjudicate the *lessees'* rights to restrict the practice of Sankirtan in their departure lounges, shops, or restaurants; it merely adjudicated the *Board's* authority to do so under this particular ordinance. The district court did not err in proceeding to judgment without joining the airlines.

## VI. ATTORNEYS' FEES

Having determined that Ms. Fernandes prevailed on ISKCON's behalf in the § 1983 claim against the D/FW ordinance, the district court concluded that a § 1988 attorneys'

fees award was appropriate. ISKCON's attorneys submitted fee requests totalling $35,000 and expense reimbursement requests of $3314.59. The court awarded $17,500 in fees and $1820.08 in expenses for services rendered in connection with this case from 1974 — when ISKCON first sued to challenge the ordinance — through August of 1979. The award was made to run against the defendants in their official capacities.

On appeal, D/FW contests the award on three grounds. First, D/FW contends the award on three grounds. First, D/FW contends that ISKCON did not prevail in the "first suit," (*i. e.*, the motion for preliminary injunction decided at 391 F.Supp. 606 (N.D.Tex.1975)) and, hence, is not entitled to a § 1988 award. Second, D/FW maintains that the award reflects an improper abrogation of the legislative immunity to which the defendants are entitled under *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). Finally, D/FW insists that ISKCON waived its claim for attorneys' fees prior to February 1, 1977 by agreeing to "abandon all claims for money damages."

[36] Section 1988 awards are reversible on appeal only for abuse of discretion. *Robinson v. Kimbrough*, 620 F.2d 468, 470 (5th Cir. 1980). To determine whether the district court abused its discretion, we must review carefully the basis upon which the court made its award. *Clanton v. Orleans Parish School Board*, 649 F.2d 1084 (5th Cir. 1981). D/FW's immunity and waiver defenses constitute legal questions which we must review as plenary matters. See, *e. g.*, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731, 100 S.Ct. 1967, 1974, 64 L.Ed.2d 641 (1980).

[37, 38] Turning first to D/FW's contention that the attorneys' fee award was erroneous because ISKCON did not prevail, we begin from the premise that interim setbacks on interlocutory motions or in settlement negotiations are immaterial to the ultimate issue. A party need not procure a judgment or settlement satisfying every claim he

asserts in order to "prevail" under § 1988. *Brown v. Culpepper*, 559, F.2d 274, 275 (5th Cir. 1977). ISKCON's failure to obtain a preliminary injunction in 1975 and the terms of settlement offers it refused along the way are of no moment: the trial judge found that ISKCON substantially prevailed as a practical matter in vindicating the rights it first asserted in 1974. We cannot say that preliminary setbacks, be they defects on a motion for preliminary injunction or an agreed dismissal and refiling necessitated by D/FW's amendment of the ordinance, render erroneous the district court's conclusion that Fernandes "prevailed." Therefore, the § 1988 award predicated on this set of facts was not an abuse of discretion.

[39-41] The Board members' immunity claim is equally unavailing. The defendants, as state officers, do not enjoy the Eleventh Amendment immunity reserved to the states. *Supreme Court of Virginia v. Consumers Union, supra; Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The legislative immunity afforded local, state, and federal legislators is likewise unavailable to protect the members of the D/FW Board because, although they are vested with rulemaking powers, they are subject to liability in this case for their actions as enforcement officers. See *Consumers Union*, 446 U.S. at 734-36, 100 S.Ct. at 1975-1977 (distinguishing between the Virginia Supreme Court's liability for legislative as opposed to enforcement activities). Furthermore, the legislative immunity discussed in *Lake Country Estates, supra*, on which defendants strongly rely, applies only to immunity from damage awards. Whether the D/FW Board members are immune from damage awards is irrelevant here because § 1988 attorneys' fee awards are an element of *costs*. Section 1988 itself, as well as the legislative history, S.Rep.No. 94-1011, 94th Cong., 2d Sess., at 5, *reprinted* in [1976] U.S.Code Cong. & Ad. News 5908, 5913, specifically provide that an award of attorneys' fees is an element of costs, not damages. *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57, L.Ed.2d 522 (1978); *Universal Amusement Co. v. Vance, supra*. Our recent case

of *Hernandez v. City of Lafayette*, 649 F.2d 336 (5th Cir. 1981), is equally not pertinent as it dealt with the issue of whether *legislative* immunity from damage claims is applicable to local officials. Regardless of the legislative immunity which might be afforded the D/FW Board members, they are not immune from a § 1988 fee award in their official capacities as law enforcers.

[42] The distinction between costs and damages is equally important in analyzing D/FW's waiver argument. D/FW asserts that ISKCON waived its claim to attorneys' fees by agreeing in 1977 to "abandon all claims for money damages."[13] The district court interpreted the language of the agreement to mean that "money damages" did not embrace a § 1988 attorneys' fee award, an element of costs. We agree with the court's interpretation as a matter of law. See *Hutto v. Finney*, 437 U.S. at 695-700, 98 S.Ct. at 2575-2579. The § 1988 award against the defendants in their official capacities is appropriate.

## VII. CONCLUSION

The decision of the district court with regard to all the provisions of the ordinance except § 4A(h)(4)(ii) warrants affirmance. We also uphold the constitutionality of § 4A(c)(1), an issue not considered by the district court. Plaintiff is entitled to attorneys' fees against the defendants in their official capacities in the amounts determined by the district court. The case is remanded to the district court so that appellees may file a motion requesting consideration of an additional award of attorney's fees for services ren-

[13]This purported waiver is contained in a letter from the parties to Judge Porter dated February 1, 1977. The letter sets forth the terms of an interim agreement providing ISKCON members with access to the airport under the newly revised ordinance pending adjudication of the civil rights claims raised in this lawsuit. The letter stipulates that "[t]his agreement in no way constitutes any accord or settlement of disputes, nor is it intended to be an abandonment or compromise of any claim or defense previously advanced by any party."

dered on this appeal. *Tasby v. Estes*, 651 F.2d 287 (5th Cir. 1981).

AFFIRMED in part, REVERSED in part, and REMANDED.

## APPENDIX

SECTION 4A. STANDARDS FOR FUND SOLICITATION CONTROL AND CONTROL OF LITERATURE DISTRIBUTION:

(b) PERMITS: It shall be unlawful for a Charitable Organization to solicit funds on the Airport premises without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. The Application shall be submitted to the designated representative of the Executive Director at least three (3) days in advance of the first day sought for solicitation, and shall state:

(1) The full name and mailing address of the person or organization sponsoring, conducting or promoting the fund drive; if the mailing address is a Post Office Box Number, the actual street address shall also be stated;

(2) Whether or not the Applicant is a branch or division of a national organization, and if so the name thereof, and the mailing and street address of same;

(3) If the Applicant is a Texas corporation, a copy of its corporate Charter, as amended, shall be furnished; if it is a foreign corporation, a copy of its Authorization Certificate to do business in the State of Texas shall accompany the Application;

(4) The purpose or object of the Charitable Solicitation;

(5) The date or dates and hours of the solicitation;

(6) The number of persons to participate in the solicitation and the true legal name and address of each;

(7) Such other pertinent information found to be necessary by the designated official to adequately enforce the terms of this Resolution.

(c) REASONS FOR REFUSAL OF PERMIT: The Application shall be granted and the Permit shall issue unless one or more of the following facts is found to exist:

(1) that one or more of the statements in the Application is not true;

(2) that the Applicant or any agent or representative of the Applicant who will participate under the Permit is presently or has been engaged in a fraudulent transaction or enterprise, or has been convicted of a felony or other criminal offense involving moral turpitude;

(3) that the expected cost of solicitation will be excessive in relation to the gross amount to be collected. Any such cost of solicitation in excess of twenty-five (25%) percent of the total amount collected shall be considered and presumed to be unreasonable, but this presumption may be rebutted by Applicant upon good cause shown. Cost of solicitation shall include any money or thing of value not reserved specifically and entirely to assist, aid or further the announced charitable cause. All accounting and bookkeeping records, government reports, all tax records for the preceding two years, and any other relevant papers or documents with reference to the Charitable Solicitation may be examined and audited either at the time of application, during the solicitation, or at or after the expiration of the Permit;

(4) when there is good reason to believe that the granting of the Permit will result in a direct and immediate danger or hazard to the public security, health, safety or welfare;

(5) when the Applicant or any agent or representative of the Applicant who will participate under the Permit has previously violated any portion of the Code

of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, or has violated any of the terms and provisions of any prior Permit.

(d) PERMITS FOR CHARITABLE LITERATURE DISTRIBUTION: It shall be unlawful for a Charitable Organization to distribute Literature or any other article on the Airport in connection with a Charitable Solicitation without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. Action on such Applications and Permits shall be governed by Paragraphs (b) and (c) set forth above for Charitable Solicitation. Permits for distribution of Literature which espouses a charitable cause, where no solicitation for, and no acceptance of, money or anything of monetary value, is involved, shall be governed by Paragraphs (b) and (c) set forth above, except subparagraph (c) (3)

....

(f) FEES: A fee of $6.00 per day for each day granted in any Permit referred to herein shall be charged and collected in advance to defray a part of the costs of Board employees' time spent in investigation, Permit preparation and subsequent supervision.

(g) CANCELLATION OF PERMITS: Any Permit granted hereunder may be cancelled after issuance if any of the above reasons for prior refusal should be discovered, or become apparent during the solicitation period.

(h) TIME, LOCATION, MANNER AND NUMBER OF PERSONS INVOLVED: When Permits for Charitable Solicitation, Charitable Literature Distribution, a combination of the two, or for political advertisement or labor-management disputes are granted, the following rules and standards shall apply:

(1) Location: Such Permits shall be restricted to the sidewalks of the Airport and the sidewalks of the Terminal Buildings on both levels thereof, but shall never be permitted inside any Terminal Building or in any other Airport structure

....

(4) Manner of Operation:

....

(gg) The Official who issues the Permit may cancel same due to any emergency situation, unusually congested conditions in the areas of the Permit caused by severe weather, schedule interruptions, or for security measures. At Permittee's option, a temporary reassignment of location may be utilized outside the location of the emergency condition, but not inside any Terminal Building or other Airport structure.

(hh) No Permittee shall interfere with the free passage of, or access of, other persons along sidewalks or at any entrances to or exits from a Terminal or any other structure; specifically, no Permittee shall ever obstruct any entrance or exit to solicit donations or distribute Literature or other articles.

(ii) No Permittee shall enter any stairwell, staircase, elevator, or escalator vestibule for solicitation or distribution purposes and shall not impede the flow of pedestrian traffic to sidewalk baggage collection or baggage loading areas. No person shall be impeded or approached while loading or unloading baggage from any public or private vehicle.

....

(i) APPEALS: When an Application for a Permit hereunder is refused, for any one or more of the reasons herein stated, the Airport Official shall state the reason or reasons for such refusal in writing and deliver a copy to the Applicant. The Applicant may appeal such refusal to the Chairman of the Dallas-Fort Worth Regional Airport Board, who shall either hear and decide such appeal, or who may at his discretion appoint one or more Board members to hear and pass upon such appeal. If such appeal is overruled, no other administrative remedy shall be appropriate, and the Appellate process shall be considered administratively exhausted.

....

APPENDIX B

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT*

UNIT A

NO. 79-3581

SUSAN FERNANDES, a/k/a SANATANI,* on behalf of herself and all International Society for Krishna Consciousness members, residing in Dallas, Texas,

*Plaintiff-Appellee,*

versus

LEONARD LIMMER, Dallas-Ft. Worth Regional Airport Security Chief, ET AL.,

*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 11, 1981, 5 Cir., 198 , F.2d ).
( January 27, 1982 )

Before INGRAHAM, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be

* So spelled in original

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

J. S. Williams
United States Circuit Judge

CLERK'S NOTE
SEE RULE 41 FRAP
AND LOCAL RULE 17
FOR STAY OF THE
MANDATE

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

## APPENDIX C

**Susan FERNANDES**

**v.**

**Leonard LIMMER et al.**

**NO. CA3-77-417-F.**

**United States District Court,**
**Northern District of Texas,**
**Dallas Division.**

**Jan. 30, 1979.**

## MEMORANDUM OPINION

ROBERT W. PORTER, District Judge.

Plaintiff is a member of the International Society of Krishna Consciousness, a nonprofit religious society, which requires its devotees to perform a religious ritual called Sankirtan, consisting in part of efforts to spread the religion's truths through the dissemination of religious tracts and solicitation of contributions. Defendant James Lilly is the Grapevine Police Chief; Defendant Leonard Limmer is the Dallas-Fort Worth Regional Airport Security Chief; and Defendant John Boyle is the Grapevine City Attorney.

Plaintiff seeks to enjoin Defendants' enforcement of a resolution passed by the Dallas Fort Worth Airport Board, and adopted as an ordinance by the cities of Dallas, Fort Worth, and Grapevine which regulates the solicitation of charitable contributions at the Dallas/Fort Worth Regional Airport (D/FW).[1] Plaintiff claims that the ordinance is

[1]A copy of the Airport Board resolution, which was adopted by the cities (City of Dallas Ordinance No. 15369, City of Fort Worth Ordinance No. 7460 and City of Grapevine Ordinance No. 77-3) is attached in Appendix A. A more detailed description of Krishna activities can be found in *ISKON* v. Rochford*, 425 F.Supp. 734 (N.D.Ill.1977); *ISKON v. Englehart*, 425 F.Supp. 176 (W.D.Mo. 1977).

* So spelled in original of this Opinion throughout.

facially unconstitutional, in violation of the First Amendment.

The parties have submitted this case to the Court on stipulated facts for decision, after the court earlier ruled on the Constitutionality of a similar previous ordinance, see *ISKON v. Dallas-Fort Worth Regional Airport Board*, 391 F.Supp. 606 (N.D.Tex. 1975), and the Board and cities revised the ordinance discussed in my 1975 decision. I have concluded that a permanent injunction restraining the Defendants from enforcing this ordinance/resolution is proper, for the reasons stated below.

*Jurisdiction*

[1] An independent ground of jurisdiction is expressly required by statute in petitions seeking declaratory judgment, and the Declaratory Judgment Act was not intended to be used as a contrivance to create jurisdiction which does not otherwise exist. 28 U.S.C. § 2201; *Commercial Metals Co. v. Balfour, Guthrie, and Co. Ltd.*, 577 F.2d 264 (5th Cir. 1978). Jurisdiction, if present, must be based upon 42 U.S.C. § 1983 or 28 U.S.C. § 1331.

[2] Defendants claim that Plaintiff, by suing the persons charged with enforcement of the ordinance, are impermissibly attempting to circumvent federal law which excludes cities and municipalities from suit under 42 U.S.C. § 1983, citing *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). The Supreme Court has held contrary to the Defendants' position in *City of Charlotte v. Firefighters*, 426 U.S. 283, 96 S.Ct. 2036, 48 L.Ed.2d 636 (1976), permitting respondents in that case to sue individual members of the City Council under 42 U.S.C. § 1983 when it was not proper to sue the City itself. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). Also, the Supreme Court now permits local government bodies to be sued directly under § 1983 for monetary, declaratory or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.

*Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). This case falls squarely within the parameters set by the Supreme Court in *Monell* and jurisdiction would also be proper under that decision.

[3] Another basis for jurisdiction is the reasoning of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Bivens* held that persons whose Fourth Amendment rights had been violated by federal agents may invoke federal question jurisdiction under 28 U.S.C. § 1331(a) and recover damages. It recognized a federal cause of action for constitutional violations in the absence of a federal statutory cause of action.

Although the Supreme Court has not yet decided whether *Bivens* can be extended to actions against municipalities, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977), the Fifth Circuit has extended *Bivens* to fourteenth amendment actions against municipalities. *Reeves v. City of Jackson, Miss.*, 532 F.2d 491 (5th Cir. 1976); *Stapp v. Avoyelles Parish School Board*, 545 F.2d 527, 531 (5th Cir. 1977); *United Farmworkers of Florida Housing Project Inc. v. City of Delray Beach Florida*, 493 F.2d 799, 811 (5th Cir. 1974); *Traylor v. City of Amarillo, Texas*, 492 F.2d 1156, 1157 n. 2 (5th Cir. 1974); *Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n. 1 (5th Cir. 1975). Other circuits have also approved this extension: *Owen v. City of Independence, Missouri*, 560 F.2d 925 (8th Cir. 1977); *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976); *Brault v. Town of Milton*, 527 F.2d 730 (2nd Cir. 1975) rev'd on other grounds, *id.* at 736 (2nd Cir. 1975) (*en banc*); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed. 2d 342 (1976). A suit against the airport would be in the nature of a suit against a municipality, and a suit against city and airport personnel might be construed as actually a suit against the municipality.

The Fifth Circuit has held repeatedly that a direct constitutional cause of action may be asserted under 28 U.S.C. § 1331 to vindicate First and Fourteenth Amendment rights. *Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979); *Stapp v. Avoyelles Parish School Board*, 545 F.2d 527, 531 n. 7 (5th Cir. 1977); *Reeves v. City of Jackson, Miss.*, 532 F.2d 491, 495 (5th Cir. 1976); *Hander v. San Jacinto Junior College*, 522 F.2d 204, 205 (5th Cir. 1975); *Roane v. Callisburg Independent*, 511 F.2d 633, 635 n. 1 (5th Cir. 1975).

The Municipal Airports Act, V.A.C.S. art. 46d-1 et seq. confers sovereign immunity upon municipalities with respect to the operation of municipal airports by expressly declaring them to be public and governmental functions. See V.A.C.S. art. 46d-15 and *Tompkins v. City of El Paso*, 449 F.2d 842 (5th Cir. 1971). This immunity does not apply in a *Bivens* context because: (1) the Supremacy Clause (Article VI cl. 2) of the U. S. Constitution mandates that no local immunity can shield a municipality for liability for Constitutional violations, *Owen v. City of Independence, Missouri*, 560 F.2d 925 (8th Cir. 1977); *Sullivan v. Murphy*, 156 U.S.App.D.C. 28, 478 F.2d 938 (1973), *cert. denied*, 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973) (federal, not state, law determines defense of immunity); *Williams v. Brown*, 398 F.Supp. 155 (N.D.Ill.1975); *Sanabria v. Village of Monticello*, 424 F.Supp. 402 (S.D.N.Y. 1976), and (2) if federal law on immunity is to be extrapolated from 42 U.S.C. § 1983, then municipalities are not immune from suit. *Monell v. City of New York Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). I therefore conclude that jurisdiction in this case is also proper under a *Bivens* action involving alleged violations of the First and Fourteenth Amendments.[2]

[2]The Defendants have requested a ruling on two other motions to dismiss, and to the extent that I have not commented on these in other parts of the opinion, I make the following rulings: (1) the motion of the Defendants to Dismiss Plaintiff's action for lack of jurisdiction over the subject matter is hereby overruled; and (2) the motion of the Defendants to Dismiss Plaintiff's action for failure to state a claim is hereby overruled.

*Standing*

[4] Defendants contend that plaintiff has no standing to challenge the DFW ordinance raising the issue of literature distribution because that distribution is usually done in the course of soliciting a contribution, and also because Plaintiff alleges only the threat of harassment and intimidation, rather than a specific illegal act committed by the Defendants.

The Supreme Court has held that solicitation of donations and contributions incidental to the main objective of preaching and propagating the doctrines of a religion is a constitutionally protected activity, *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); see *ISKON v. Collins*, 452 F.Supp. 1007 (S.D. Tex.1977). In *Murdock*, the Supreme Court emphasized that the First Amendment protection is in no way diluted by the "commercial" aspects of the solicitation:

"The mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of a collection plate in church would make the church service a commercial project . . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that religious organizations need funds to remain a going concern . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 319 U.S. at 111, 63 S.Ct. at 874.

There is no evidence in this record which suggests that Plaintiff's *dominant purpose* is the solicitation of funds; therefore, I reject Defendants' argument that soliciting contributions jurisdictionally taints the concurrent exercise of free speech rights.

The Supreme Court has also held that federal injunctive relief may be proper if there exists the threat of arrest which

would be processed through the State courts, and no criminal proceedings are in fact pending in state court. *Doran v. Salem Inn*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) precludes federal suit when a state criminal action based upon the same nucleus of operative facts is pending. Plaintiff has standing whether or not the conduct could be proscribed by a properly drawn ordinance and whether or not Plaintiff ever applied for a permit. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

The parties have stipulated that although the Airport Board's Resolution and corresponding ordinances passed by the cities have been in effect for a long period of time, no attempt has been made to enforce these laws due to the pendency of the original suit and an agreement executed between the parties December 21, 1975 and letter agreement dated February 1, 1977. *Younger* is therefore inapplicable. Clearly if these agreements were not in force, Plaintiff and other members of the Krishna sect could and would be prosecuted if they violated the ordinance, and counsel for Defendants so represented to the court when the court held oral argument in chambers. Plaintiff has standing in this action.[3]

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[3]The exception for commercial speech protection under the First Amendment, see, e. g. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), "all but passed from the scene . . ." in 1975. *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). There are some differences in the amount of protection afforded commercial speech but as the Krishna's dominant purpose, as evidenced from this record, is not solicitation of funds (although it is clearly a substantial purpose), these differences are not material in this case. *Virginia Pharmacy, id.*, 425 U.S. at 771 n.24, 96 S.Ct. 1817.

*Indispensable Parties*

[5] Defendants cite *ISKON v. New York Port Authority*, 425 F.Supp. 681 (S.D.N.Y. 1977), arguing that all of the airline tenants who use the Dallas Fort Worth Regional Airport should be joined as indispensable parties to this litigation in order to effectuate complete relief. Fed.R.Civ.Pro. 19. In the *Port Authority* case, the New York Port Authority had a consistent policy of permitting unrestricted ISKON tract distribution and contribution in all public areas of the New York airport terminals (JFK, La Guardia, Newark) within which the Port Authority believed it had the power to grant such permission. The Port Authority contended that it lost the power to grant this permission once it leased the space to tenants. The court held that the airline leasees should be joined because: (1) joinder of the airlines would not affect the issue of subject matter jurisdiction, (2) a determination that the Port Authority had the power to regulate the licensing of First Amendment activities in leased areas would substantially affect the rights of the airlines under their lease agreements and, (3) the relief sought by Plaintiffs would require a determination that areas leased to airline tenants were First Amendment forums, if the court found that the Port Authority did not have authority over the airlines' leased areas.

The broad relief requested by the Plaintiffs in *Port Authority* and which was the basis of Judge Carter's decision to join the airline lessees in the suit, is materially different from the relief requested in this case. Solely attacked in this case is the facial unconstitutionality of Resolution 76-128 of the DFW Airport Board, and which was approved by the cities of Dallas, Fort Worth and Grapevine. Second, the Airport Board has entered into stipulations with ISKON (See Stipulation of Facts (SOF) #3, and SOF Ex. #1, 2), and has never contended that the Board lacked power to enter into these stipulations or that other parties were required as signators. The court also entered an order on February 7, 1978 permitting any airline licensee to file petitions in intervention. No petitions were filed. A letter response from

the airlines, which I am including in the record, was received by the court on February 10, 1978 indicating that the airlines did not wish to intervene. Since my ruling will be restricted to the facial unconstitutionality of the Resolution and ordinances, and will not involve a determination of the lease rights, my decision should not affect the airline lessees or their lease rights.

*Amount in Controversy*

[6] Defendants have urged that this case does not involve $10,000 in controversy. A $10,000 amount in controversy is not a requirement under 28 U.S.C. § 1343(3) & (4) for alleged violations of first amendment civil rights under 42 U.S.C. § 1983. *Douglas v. City of Jeannette, Pa.*, 130 F.2d 652 (3rd Cir. 1942), *aff'd* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943).

For a *Bivens* action, a $10,000 jurisdictional requirement is imposed under 28 U.S.C. § 1331. The courts have consistently held that the denial of First Amendment rights inflicts irreparable injury, notwithstanding the availability of alternative forums. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 160-161, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Dombrowski v. Pfister*, 380 U.S. 479, 489, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Quantity of Copies of Brooks v. Kansas*, 378 U.S. 205, 244-245, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Quaker Action Group v. Hickel*, 137 U.S.App.D.C. 176, 421 F.2d 1111 (1969). Even a day's delay of First Amendment freedoms causes irreparable injury, *Quaker Action Group, supra.*

> . . . (T)he other option — violating the law to exercise one's constitutional rights and awaiting the sure hand of the law — itself may cause, as it is alleged to cause, irreparable injury both economic (in the form of loss of revenue because customers are fewer and increase in costs due to the difficulty of finding employees willing to risk arrest, prosecution and possible imprisonment) and personal (the freedom to exercise

first amendment rights without genuine fear of prosecution). Where other plaintiffs have faced the similar situation of being required to forego constitutionally protected activity in order to avoid arrest, the Supreme Court has found irreparable injury (citations omitted).

*414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2nd Cir. 1974).

The Constitution does not preserve only those rights which can be accurately measured by the dollar; it also preserves those rights which are priceless. I find that Plaintiff has properly asserted the $10,000 jurisdictional amount in controversy for a *Bivens* action under the First Amendment.

*The Resolution/Ordinance*

[7, 8] Neither the cities nor the Airport Board may completely bar the distribution of literature containing religious or political ideas in *public places*. In public places the cities or the Airport Board may impose regulations reasonably related to the public interest, convenience and necessity of the time, place and manner of first amendment activities, *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939), and any attempted regulation of the dissemination of ideas in public places must be carefully drawn so that it does not abridge the Constitutional guarantees of freedom of speech and religion. *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1945); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). Defendants urge that the airport is private property and therefore the cities and the Airport Board may substantially regulate the distribution (or "sale", as the Defendants' term it) of Krishna religious literature.

[9] The resolution/ordinance regulates the distribution of political, labor-management, and charitable literature and solicitation of funds on the Airport grounds, requiring the purchase of a permit. Permits for charitable solicitation,

charitable literature distribution, or a combination of the two, and political advertisements or labor-management disputes are restricted to the sidewalks of the Airport and Terminal Building "but shall never be permitted inside any terminal building or in any other Airport structure." Resolution #76-128 § 4A (h). Thus there are two distinct geographic areas regulated by the resolution/ordinance: outside the terminal, and inside the terminal. The preliminary question narrows to whether any or all of the geographic area regulated in the resolution/ordinance at D/FW Airport is a "public" forum.

*Outside D/FW Terminal*

In my earlier opinion, I reviewed three public forum cases, *Marsh v. Alabama, supra, CAMP v. Chicago,* 508 F.2d 921 (7th Cir. 1975), and *Kuszynski v. City of Oakland,* 479 F.2d 1130 (9th Cir. 1973), and concluded:

(1) D/FW is analogous to a company town, and "the cities will be hard pressed . . . to justify banning the Plaintiffs completely from the entire 18,000 acre area";

(2) the *CAMP* decision holding O'Hare Airport was a public forum was limited geographically to within the terminal buildings and did not include the "fingers" leading to the arrival and departure gates, leaving a question as to whether those areas were also public forums; and

(3) *Kuszynski,* while holding that an airport is a public forum, did not indicate whether all portions of an airport were public forums although the ordinance apparently forbade distribution of literature only in certain (unspecified in the opinion) areas of the airport and regulated the manner of distribution in other (also unspecified) areas.

Recent cases have generally not analyzed whether certain portions of an airport could, in fact, be private areas, or whether the airport itself could be a legitimate private area, but have concluded that airports are public forums without extensive analysis. *ISKON v. Collins,* 452 F.Supp. 1007

(S.D.Tex.1977); *ISKON v. Englehart*, 425 F.Supp. 176 (W.D.Mo.1977) (portions of airport open to public are public forums); *ISKON v. Rochford*, 425 F.Supp. 734 (N.D.Ill. 1977); *ISKON v. Griffin*, 437 F.Supp. 666 (W.D. Pa.1977); *ISKON v. Eaves*, (N.D.Geo. 1976) (unpublished) (little difference between airport and public street as protected forum); *ISKON v. Lamb*, (D.C.Nev.1975) (unpublished) (McCarran International Airport is public forum); *ISKON v. Wetzel*, (D.C.Ariz.1975) (unpublished) (publicly owned airport is public forum); *ISKON v. Lentini*, (E.D.La.1975) (unpublished letter opinion).

A more detailed analysis was made by the court in *ISKON v. Adlum*, (W.D.Wash.1978) (unpublished) but the court did not adequately relate its conclusion that areas available to the public were first amendment forums with its earlier detailed findings of fact describing various areas of the airport. In *ISKON v. Wolke*, (E.D.Wis.1978) (unpublished) the court relied heavily on *Logan Valley* (discussed below), a decision of the Supreme Court that was overruled, a 1968 Second Circuit case whose reasoning may be outdated by subsequent Supreme Court decisions, and *ISKON* cases cited above which ignore the fundamental issues, and merely draw the conclusion that airports are public forums without discussing any basis for the decision.

Defendants rely on *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) where Justice Stewart, writing the majority opinion, concluded that shopping centers are *not* First Amendment forums, and that *Amalgamated Food Employees Union v. Logan Valley*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), which held to the contrary, was overruled by *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). In *Lloyd* the Supreme Court apparently conceded that shopping centers have sidewalks, streets, and parking areas which are functionally similar to those found in municipalities, but concluded that these did not make a shopping center functionally equivalent to a municipality. Even though Lloyd's private police were given full police power by the

city of Portland, and Lloyd's was very intertwined with streets, the court in *Hudgens* sided with Justice Black's dissent in *Logan Valley* where he noted that the shopping center in that case contained no homes, sewage disposal plant, or post office, all attributes of municipalities and company towns, both acknowledged first amendment forums. *Marsh v. Alabama, supra.*

Entrance to D/FW Airport, which has a completely fenced perimeter, is through two toll plazas, one at the north and one at the south entrance, which feed cars onto a road which bisects the complex. Money is charged for the use of the roadway, and airport parking facilities. Ground transportation carriers cannot operate within the airport without the express written permission of the Airport Board. Access to the airport is not limited to those persons intending to travel on an airline. The airport complex includes a hotel, a bank, gas stations, bars, 14 restaurants, newsstands, gift shops, tobacco shops, toy shops, parking lots, and AIRTRANS surface transportation within the airport complex; all of these facilities are available to the general public. The Airport maintains its own security force; over 14,000 people work at the airport. The concession areas in the airport and the terminal buildings are leased to the airlines.

D/FW thus embraces many features of the *Marsh* company town and of the *Lloyd* shopping center, although clearly D/FW is not a shopping center itself. D/FW has one element not found in either *Lloyd*, *Logan Valley*, or *Hudgens*, cases which all involved *privately* owned areas which appeared to have primarily a public function. D/FW, although leased in part to tenants, is owned in fee simple by the City of Dallas and the City of Fort Worth, a *publicly* owned area.

In *Marsh* the Supreme Court downplayed ownership when it found a privately owned company town was a first amendment public forum. The Court stretched that principle in *Logan Valley* to transform a privately owned shopping center into a public forum for expression, and then retreated

from that determination in *Lloyd* and *Hudgens*. Perhaps a privately owned airport could be analagous to the private shopping centers in *Lloyd* and *Hudgens*. Here, however, public ownership combined with the company town activities which occur at the airport, clearly indicate that D/FW airport, at least those parts which are not leased to others, is a public forum. *Marsh v. Alabama, supra; Kuszynski v. City of Oakland, supra.*[4]

*In-Terminal Prohibition*

The Defendants vigorously defend the right of D/FW, through the resolution/ordinance, to deny the Plaintiff and other members of the Krishna sect, access to the inside of the Terminal buildings for distribution of literature and solicitation of contributions. Although the Airport Board has leases for the Terminal Buildings with the airlines, those leases are not in themselves determinative in resolving what constitutes a public forum, *Marsh v. Alabama, supra;* they are one factor in determining the character of a place. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

The Airport Board apparently maintains enough control over the inside of the Terminal Buildings to prohibit the solicitation of charitable contributions in those areas and enforce that prohibition (Appendix A) and negotiate interim provisions for in-terminal solicitation during the

[4]The character of the airport and the pattern of usual activity make the airport an appropriate place for communication of views. It is one of the busiest airport terminals in the United States. The crowds outside the terminal buildings are not captive audiences, but can move freely from place to place. See *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (bus terminal is public forum). True, the principal purpose of the airport is to move people from one place to another via airplane; but the court must look beyond "principal" purposes to determine whether or not an area is a "public" forum. "Streets" are primarily designed to assist the movement of traffic and people, but they are proper First Amendment forums. *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

pendency of this lawsuit. (SOF Ex. #1, 2). The activities within the buildings, described above, are analagous to those in a company town or bus station. Some parts of the inside terminals are probably private (for example, the areas restricted to flight personnel); other areas may or may not be public forums (for example, the American Airlines main departure lounge, or the Braniff individual departure seating areas); but clearly there are portions of the terminal (for example, the public corridors and entrance halls to the airport terminal buildings) that are public forums. In those areas the public is not a captive audience (as they may be in the departure lounge areas), nor is access otherwise restricted for safety or security reasons (as it presumably is in the flight personnel areas).

I conclude that at least part of the airport terminal buildings are public forums, and therefore the portion of the resolution and ordinances that prohibits solicitation within the terminal buildings is facially unconstitutional as overbroad, and Defendants are enjoined from enforcing this total prohibition. *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); *Zwickler v. Koota*, 389 U.S. 241, 88, S.Ct. 391, 19 L.Ed.2d 444 (1967); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

*Freedman Safeguards*

[10] Regulations which vest a public official with the authority to grant, deny, and revoke permission to exercise First Amendment rights must provide four procedural safeguards; (1) the licensor must grant or deny the permit in the briefest specified time frame possible; (2) if the permission as sought is denied or revoked, the ordinance or regulation must require a licensor to institute within a specified brief time a proceeding for temporary, preliminary and permanent injunction to restrain the proposed expression asserted to be constitutionally protected, and assume the burden of proof in such judicial proceedings; (3) any restraint imposed in advance of a final judicial determination

on the merits must be limited to preservation of the status quo for the shortest fixed period; and (4) it must assure a prompt final judicial decision. *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

Defendants suggest that *Freedman* is applicable solely to licensing laws where the literature to be disseminated must be approved, and not where the approval is as to the background and intentions of the applicant. This position is inconsistent with the Supreme Court's concern for substantive and procedural due process safeguards where one must first pass before a licensor before being allowed to express First Amendment rights. The Court in *Freedman*, a censorship case, noted that a censorship proceeding puts the initial burden on the exhibitor or distributor. The censor may well be less responsive than a court to the interests of free expression and if the decision is delayed, the censor's determination may in fact be final. These concerns prompted the Court to require the four procedural safeguards. *Freedman, supra.* The same concerns are evident when the resolution/ordinance may indirectly regulate speech content by regulating who may speak. The procedural requirements set out in *Freedman* are applicable to licensing laws, including the resolution/ordinance in this case, where the licensor regulates approval of who may exercise First Amendment expression by inquiry into the background and intentions of the applicant.

[11] This conclusion is consistent with cases following *Freedman* which have applied the *Freedman* safeguards to other systems of prior restraint. See *United States v. Thirty-seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1970) (system by which federal customs agents seize imported materials); *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) (system by which postal officials restrict use of mails); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (permit to conduct march on public streets). Therefore the resolution/ordinances are constitutionally

defective on their face because they fail to provide *Freedman* safeguards, specifically:

(a) the application must be made three days in advance but there is no specific brief time requirement as to when it must be acted upon, § 4A(b);

(b) if the permit is denied or revoked, there is an appeal procedure without any specific brief time limitations, § 4A(j) and no *court* appeal is provided; and

(c) if judicial review of the denial or revocation of a permit is initiated by the director, there is no requirement in the regulation assuring the prompt conclusion of that review.

*Overbreadth and Vagueness*

[12] Rules restricting the exercise of First Amendment activities to prior approval are inherently suspect and bear a heavy presumption against their constitutional validity. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1968). The standards set forth must be "susceptible of objective measurement", *Keyish v. Board of Regents*, 385 U.S. 589, 603-604, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), and "precision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed2d 405 (1962). "Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards." *Southeastern Promotions, supra*, at 95 S.Ct. 1244. Plaintiff attacks 5 provisions of the Dallas/Fort Worth Airport ordinance as unconstitutionally overbroad or vague.

*"Fraudulent transaction" § 4A(c)(2)*

[13] This section provides that a permit is denied if the licensor views the applicant "as presently or previously engaged in a fraudulent transaction or enterprise." § 4(A)(c)(2) (See Appendix A). *Cantwell v. Connecticut*,

*supra*, presented the Court with a licensing law that permitted a public official to determine if a religious solicitation campaign was fraudulent or of a bona fide religious nature. The Supreme Court invalidated the licensing law because the licensor had been given discretion to make judgmental assessment of facts.

> "Nothing we have said is intended to even remotely imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct." *Cantwell v. Connecticut, supra*, 310 U.S. at 306, 60 S.Ct. at 904.

The Court conceded in *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939) that fraudulent appeals may be made in the name of religion, but concluded:

> "A municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion to the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespass may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not impower a municipality to abridge freedom of speech and press." *Schneider* at 164, 60 S.Ct. at 152.

I find that the provision is unconstitutionally vague and impermissible. As the Supreme Court noted, there are other means, e. g. penal laws, to prevent the perpetration of a fraud on the public (or, in Texas, there is the Texas Deceptive Trade Practices Act which might apply civil penalties).

*"Public security, health ,safety"* § 4A(c)(4)

[14] A permit can be denied if the licensor decides he has "good reason to believe" the permit will result in "hazard to the public security, health, safety or welfare". § 4A(c)(4) (See Appendix A). Numerous Supreme Court cases have held similar vague standards unconstitutional, where a public official is left to decide if he deems granting or denying a permit would be dangerous or hazardous to the public interests. The standard of "good reason to believe" gives the public official in this case virtually unlimited discretion to deny a permit—the regulation becomes a license to rationalize good reasons. See *Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1948) ("public welfare and morals"); *Largent v. Texas*, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943) ("proper and advisable"); *Shuttlesworth v. Birmingham, supra*, ("public welfare, peace, safety, health"). These criteria are unconstitutionally vague.

*"Interfere, impede, obstruct"* § *4A(h)(4) (hh); § 4A(c)(5); § 4A(h)(4)(ii); § 4A(c)(5)*

[15] A licensor may cancel a permit or deny renewal if it is his judgment that the permittee has "interfere(d) with the free passage of, or access of" other persons; "ever obstructed any entrance or exit to solicit donations or distribute literature" (§ 4A(h)(4)(hh); § 4A(c)(5); or "impede(d) the flow of pedestrian traffic" § 4A(h)(4)(ii); § 4A(c)(5). "Obstruct" and "impede" are again terms that permit the enforcer of the regulation unbridled discretion in determining when to cancel or deny renewal of a permit; they are unconstitutionally vague, as is the term "interfere". In *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) the Court invalidated a similar ordinance (similar in that it used similar vague terminology) that criminalized those who "interfere" with a business. The Court held that the term "interfere" was overbroad because it could "be proved merely by showing that others react in a way normally expectable of some upon learning the facts of a dispute." *Thornhill, supra*, at 60 S.Ct. 743. A similar

criticism can be made of the terms used in this resolution/ordinance and I find them unconstitutionally broad and vague.

*Excessive Costs § 4A(c)(3) & Emergency Situation § 4A(h)(4)(gg)*

A permit may be refused if the licensor determines that the "expected cost of solicitation will be excessive in relation to the gross amount to be collected." § 4A(c)(3). The licensor is empowered to immediately cancel a permit, and close the Airport to First Amendment expression regulated by the resolution/ordinance, while leaving it open to the general public, if he deems that there exists "any emergency situation, unusually congested conditions in the areas of the permit caused by the severe weather, schedule interruptions or for security measures." § 4A(h)(4)(gg).

[16] It probably would not be unreasonable to prohibit certain First Amendment expression during "emergency" situations but there is no justification for the present restriction (§ 4A(h)(4)(gg)) in this record, and when first amendment freedoms are involved, the Defendants bear a heavy burden that they must meet to justify the restrictions. Therefore, I find that Defendants have not met this burden at this time with regard to this particular restriction, and it is therefore unconstitutional on its face.

[17] When costs exceed 25% of the amount collected, the cost of solicitation is deemed "unreasonable" and therefore presumably "excessive," although that presumption may be rebutted by a showing of good cause. To enforce this provision, the resolution/ordinance permits examination of all accounting and bookkeeping records, tax records, etc. of a charity for audit.

Defendants contend that a similar provision passed Constitutional muster in *National Foundation v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), when the Fifth Circuit upheld a 20% limitation with a similar "good cause" provision.

The Fifth Circuit, however, never addressed the question of whether or not such financial disclosure invaded the traditional separation of church and state because the National Foundation was not a religious organization. The Circuit held that the Foundation, not religious organizations, had no right to solicit funds for charity without state regulation. The Circuit's holding was thus limited to the non-religious Foundation and this case presents a different factual setting.

Moreover, the District Court rejected the other constitutional arguments presented by the Foundation by holding that "there is no constitutional right to make public solicitation of funds for charity" (a holding apparently upheld by the Circuit), and *Virginia Board of Pharmacy* and *Bates* have made that view of "commercial speech" incorrect. *National Foundation v. City of Fort Worth*, 307 F.Supp. 177 (N.D. Tex.1967).

Recent Supreme Court cases decided after *National Foundation* clearly indicate that this type of financial inquiry into the use of church funds is not constitutionally permissible. In *Lemon v. Kurtzman*, 403 U.S. 602, 620, 91 S.Ct. 2105, 2114, 29 L.Ed.2d 745 (1971) the Court observed:

> "The program requires the government to examine the schools records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids . . . We cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses".

No church or political party should be compelled to bear itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such a need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who

associate with the Society and deal with it financially is great, as is the impact of the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S.Ct. 303, 38 L.Ed.2d 260 (1974); *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Bates v. Little Rock*, 361 U.S. 516, 522-23, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); *NAACP v. Button*, 371 U.S. 415, 431, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Talley v. California*, 362, U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960).

These provisions for financial disclosure, etc. are thus unconstitutional on their face.[6]

[18] Finally, the ordinance/resolution levies a $6 per day fee for each permit, § 4A(f). In *Murdock v. Pennsylvania*, 319 U.S. at 112-113, 63 S.Ct. 870 (1943) the Supreme Court held that the payment of a $1.50 per day fee as a precondition for obtaining the permission of the government to solicit and exercise one's right of free speech was unconstitutional.

> It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeanette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges . . .
>
> It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax — a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right guaranteed by the federal constitution . . .

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[6]Any spending ceiling imposed upon a religious organization carrying on a religious solicitation is, per se, violative of the First Amendment. See *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) where the Court struck down restrictions on the amount of money a person or group could spend on political communication.

As the court noted in *Hull v. Petrillo*, 439 F.2d 1184, 1186 (2nd Cir. 1971):

> The ability to pay is not a legitimate criterion for the state to employ in determining who is to express his views on its streets and who is not. Therefore any fee imposed as a prerequisite to the exercise of the right to communicate ideas on the public sidewalk is an unconstitutional prior restraint upon the freedom of expression.

Therefore the $6 per day charge is also unconstitutional.*

Many people believe that the Krishnas are unjustifiably harassing airline travelers at the Dallas-Fort Worth Airport. The Krishnas express views currently not shared by many Americans, and their repeated efforts to convince us to follow the path of Krishna may be irritating and unpleasant. I can understand, therefore, why it may be difficult to accept my ruling, unless there is a clear understanding of the purpose of the First Amendment in the Bill of Rights.

The founders of this nation also expressed unpopular views and practiced religions that offended many Englishmen. These early Americans suffered religious persecution, jail, and death to establish the freedom to speak what they believed. The framers of the Constitution remembered this oppression when they wrote the Bill of Rights and placed their faith in a system of government by which everyone could freely express their ideas, no matter how unpopular those ideas might be at the time. Recognizing that there are many ways to seek the Truth and the Spirit, they also recognized that a man does not need a flock of followers to express a good idea.

In my original opinion in this case on preliminary injunction *ISKCON v. Dallas-Fort Worth Regional Airport Board*,

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*The Plaintiffs attack other features of the resolution/ordinance which I will not comment upon at this time; at a minimum the resolution/ordinance, as written, will have to be redrafted to include the *Freedman* safeguards and eliminate the objectionable portions referred to in this opinion if the cities and Airport Board insist upon regulating this type of activity at the Airport.

391 F.Supp. 606 (N.D.Tex.1975), I stated at page 610: "It has been the Court's observation, however, that First Amendment rights, such as those of speech and religion, most often are raised by those who, like the Krishnas, are in the minority and are viewed by the majority as unpopular, if not downright unsavory." I expand on it today only to say that the American people must recognize and appreciate that the Framers of the Constitution adopted the Bill of Rights, including and most importantly the right of freedom of speech, to protect the individual against the majority. Thus, contrary to what many Americans mistakenly feel, the majority does not rule the Bill of Rights. In so stating, I can rely, among others, on Winston Churchill who, in commenting on the American Constitutional Republic, stated in substance . . . "it is a very bad system, save and except all others".

I will defer any determination of attorneys fees for at least 90 days until I can hold a hearing and consider evidence on the factors found in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). During that 90 day period the parties should attempt to reach an agreement on an ordinance/resolution that will meet the requirements of the Constitution.

The parties to this suit should report on the progress toward this goal 30 days from the entry of this order.

Enforcement of City of Dallas Ordinance No. 15369, City of Fort Worth Ordinance No. 7460, City of Grapevine Ordinance No. 77-3, and Airport Board Resolution No. 76-128 by the Defendants is hereby permanently enjoined.

In closing, I am reminded of an old Navy axiom which, refined for publication, would read: "Paint it, hit it or salute it". Accordingly, today I paint the ordinance/resolution overbroad, I hit it with a tag of facial unconstitutionality, salute the First Amendment, and hereby enjoin its enforcement as hereinabove outlined.

It is so ORDERED.

## APPENDIX A

## RESOLUTION NO. 76-128

A Resolution by the Dallas-Fort Worth Regional Airport Board amending Resolution No. 71-172, entitled "The Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board" by adding Section 4A. to Chapter Three thereof, to be entitled "Standards for Fund Solicitation Control and Control of Literature Distribution"; Defining Terms; Providing the conditions and standards under which Permits may be granted to, or denied, Applicants for charitable and other fund solicitations on the Airport; Providing the conditions and standards under which Permits may be granted to Applicants for the distribution of Literature on the Airport, in connection with a charitable solicitation; Providing the conditions and standards under which Permits may be granted to Applicants in connection with political campaigns and Labor-Management disputes; Providing for fees to be charged for issuance of such Permits and for the cancellation of outstanding Permits; Providing for the regulation of the time, location, manner and number of persons who solicit funds under the Permit authority; Providing for Appeals from Permit denials; Providing a Penalty, a Severability and Savings Clause, and declaring an effective date.

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WHEREAS, it is the desire and purpose of the Dallas-Fort Worth Regional Airport Board to more effectively control Charitable Fund Solicitation and Literature Distribution on Airport premises, and to protect the travelling public as well as persons desiring to solicit for charities, to balance the legal rights of each group, and to protect the public health, security, safety and general welfare;

NOW, THEREFORE, BE IT RESOLVED BY THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD:

SECTION 1. That the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, adopted by

Resolution No. 71-172, is hereby amended by adding to Chapter Three thereof, entitled "Personal Conduct," a section numbered 4A., to be entitled "Standards for Fund Solicitation Control and Control of Literature Distribution," such Section to read as follows:

"SECTION 4A. STANDARDS FOR FUND SOLICITATION CONTROL AND CONTROL OF LITERATURE DISTRIBUTION:

(a) *DEFINITIONS:*

(1) "Charitable Organization" is defined as any person, firm, group, partnership, corporation or association whose avowed purpose and object is to benefit, assist, aid and further the following causes:

(aa) philanthropy;

(bb) assistance to persons who are poor, impoverished, destitute, underprivileged, needy, diseased, injured, crippled, disabled, handicapped, or in need of physical or mental rehabilitation;

(cc) churches, religious societies or other religious sects, groups or orders espousing spiritual and altruistic motives or conduct;

(dd) the teaching of patriotism, or promoting relief and assistance to this nation's war veterans;

(ee) beneficial education of the mind or assistance to educational institutions; or

(ff) the protection, shelter and sustenance of animals.

(2) "Charitable Solicitation" is defined as seeking money donations, pledges thereof, or anything of value to benefit, assist, aid and further the cause of a charitable organization, either orally or by literature distribution.

(3) "Literature" is defined as books, pamphlets, handbills, tracts, cards, circulars, pictures, films, magazines, or any other written or printed material.

(b) *PERMITS:* It shall be unlawful for a Charitable Organization to solicit funds on the Airport premises without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. The Application shall be submitted to the designated representative of the Executive Director at least three (3) days in advance of the first day sought for solicitation, and shall state:

(1) The full name and mailing address of the person or organization sponsoring, conducting or promoting the fund drive; if the mailing address is a Post Office Box Number, the actual street address shall also be stated;

(2) Whether or not the Applicant is a branch or division of a national organization, and if so the name thereof, and the mailing and street address of same;

(3) If the Applicant is a Texas corporation, a copy of its corporate Charter, as amended, shall be furnished; if it is a foreign corporation, a copy of its Authorization Certificate to do business in the State of Texas shall accompany the Application;

(4) The purpose or object of the Charitable Solicitation;

(5) The date or dates and hours of the solicitation;

(6) The number of persons to participate in the solicitation and the true legal name and address of each;

(7) Such other pertinent information found to be necessary by the designated official to adequately enforce the terms of this Resolution.

(c) *REASONS FOR REFUSAL OF PERMIT:* The Application shall be granted and the Permit shall issue unless one or more of the following facts is found to exist:

(1) that one or more of the statements in the Application is not true;

(2) that the Applicant or any agent or representative of the Applicant who will participate under the Permit is presently or has been engaged in a fraudulent transaction

or enterprise, or has been convicted of a felony or other criminal offense involving moral turpitude;

(3) that the expected cost of solicitation will be excessive in relation to the gross amount to be collected. Any such cost of solicitation in excess of twenty-five (25%) percent of the total amount collected shall be considered and presumed to be unreasonable, but this presumption may be rebutted by Applicant upon good cause shown. Cost of solicitation shall include any money or thing of value not reserved specifically and entirely to assist, aid or further the announced charitable cause. All accounting and bookkeeping records, government reports, all tax records for the preceding two years, and any other relevant papers or documents with reference to the Charitable Solicitation may be examined and audited either at the time of application, during the solicitation, or at or after the expiration of the Permit;

(4) when there is good reason to believe that the granting of the Permit will result in a direct and immediate danger or hazard to the public security, health, safety or welfare;

(5) When the Applicant or any agent or representative of the Applicant who will participate under the Permit has previously violated any portion of the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, or has violated any of the terms and provisions of any prior Permit.

(d) *PERMITS FOR CHARITABLE LITERATURE DISTRIBUTION:* It shall be unlawful for a Charitable Organization to distribute Literature or any other article on the Airport in connection with a Charitable Solicitation without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. Action on such Applications and Permits shall be governed by Paragraphs (b) and (c) set forth above for Charitable Solicitation. Permits for distribution of Literature which

espouses a charitable cause, where no solicitation for, and no acceptance of, money or anything of monetary value, is involved, shall be governed by Paragraphs (b) and (c) set forth above, except subparagraph (c) (3).

(e) *PERMITS FOR POLITICAL OR LABOR-MANAGEMENT LITERATURE DISTRIBUTION:* It shall be unlawful for a person to distribute Literature on the Airport whether or not there is solicitation or acceptance of money or anything of monetary value therefor, which is distributed in connection with the campaign of a political candidate or political issue, or in connection with a labor-management dispute, without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. Action on such Applications and Permits shall be governed by Paragraphs (b) and (c) set forth above, except subparagraph (c) (3).

(f) *FEES:* A fee of $6.00 per day for each day granted in any Permit referred to herein shall be charged and collected in advance to defray a part of the costs of Board employees' time spent in investigation, Permit preparation and subsequent supervision.

(g) *CANCELLATION OF PERMITS:* Any Permit granted hereunder may be cancelled after issuance if any of the above reasons for prior refusal should be discovered, or become apparent during the solicitation period.

(h) *TIME, LOCATION, MANNER AND NUMBER OF PERSONS INVOLVED:* When Permits for Charitable Solicitation, Charitable Literature Distribution, a combination of the two, or for political advertisement or labor-management disputes are granted, the following rules and standards shall apply:

(1) Location: Such Permits shall be restricted to the sidewalks of the Airport and the sidewalks of the Terminal Buildings on both levels thereof, but shall never be permitted inside any Terminal Building or in any other Airport structure.

(2) Time: Permits shall be issued for no more than a total of eight (8) days in any one calendar month, but

the days need not be consecutive. Permit holders shall be restricted to the hours of 9:00 o'clock A.M. to 6:00 o'clock P.M. on the days of operation.

(3) Number of Persons: Not more than two (2) persons representing any one group or organization shall be permitted on a specified area of the sidewalks of a Terminal Building at one time, and no more than a total of four (4) persons from that group shall be permitted at one Terminal Building.

(4) Manner of Operation:

(aa) Each person included in a Permit shall be issued, and shall wear, a badge, nameplate, card or other personal identification on the upper clothing and in a manner clearly visible to the public. Such identification shall state the true and correct legal name of the solicitor and the organization or cause represented. It shall not be transferred to another person and must be returned to the issuing Airport official at the expiration of the Permit.

(bb) No Permittee shall make loud noises or create any other disturbances. No dancing, chanting, use of drums, cymbals, other musical instruments, or noise-making devices shall be permitted.

(cc) Permittees at all times are subject to all laws: Federal, State or Local, regarding fraud, assault, battery, theft, littering, picketing and all other laws relating to the conduct of persons in public places.

(dd) Permittees, when soliciting donations in connection with the distribution of Literature or the distribution of other articles, shall inform the person approached by them that a donation is solicited prior to the time such material is delivered to the prospective donor and such solicitor shall make the proper money change when informed of the amount being donated.

(ee) No Permittee shall erect or place a table, bench, chair, or other structure on any sidewalk or other premises of the Airport.

(ff) No Permittee shall distribute candy, gum or other food snacks or any food product, and shall not pin, tie, or attach any flower or other symbol, insignia or article on the clothing, luggage or vehicle of passengers or other persons at the Airport.

(gg) The Official who issues the Permit may cancel same due to any emergency situation, unusually congested conditions in the areas of the Permit caused by severe weather, schedule interruptions, or for security measures. At Permittee's option, a temporary reassignment of location may be utilized outside the location of the emergency condition, but not inside any Terminal Building or other Airport structure.

(hh) No Permittee shall interfere with the free passage of, or access of, other persons along sidewalks or at any entrances to or exits from a Terminal or any other structure; specifically, no Permittee shall ever obstruct any entrance or exit to solicit donations or distribute Literature or other articles.

(ii) No Permittee shall enter any stairwell, staircase, elevator, or escalator vestibule for solicitation or distribution purposes and shall not impede the flow of pedestrian traffic to sidewalk baggage collection or baggage loading areas. No person shall be impeded or approached while loading or unloading baggage from any public or private vehicle.

(jj) No Permittee shall operate in the roadways adjoining the Terminal sidewalks, nor in any other manner impede vehicular traffic in any roadway.

(kk) All Literature distributed by a Permittee which may be discarded by recipients shall be retrieved and the solicitation area cleared and cleaned of same daily.

(i) *APPEALS:* When an Application for a Permit hereunder is refused, for any one or more of the reasons herein stated, the Airport Official shall state the reason or reasons for such refusal in writing and deliver a copy to the Appli-

cant. The Applicant may appeal such refusal to the Chairman of the Dallas-Fort Worth Regional Airport Board, who shall either hear and decide such appeal, or who may at his discretion appoint one or more Board members to hear and pass upon such appeal. If such appeal is overruled, no other administrative remedy shall be appropriate, and the Appellate process shall be considered administratively exhausted.

(j) *SEVERABILITY AND SAVINGS CLAUSE:* The sections, paragraphs, sentences, clauses and phrases of this Resolution are severable, and if any phrase, clause, sentence, paragraph or section of this Resolution shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Resolution, since the same would have been enacted without the incorporation in this Resolution of any such unconstitutional phrase, clause, sentence, paragraph or section. Further, the passage of this Resolution shall in no manner affect any other provisions of the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, and all such other provisions shall remain in full force and effect.

(k) *PENALTY:* The violation of any provision of this Resolution where an act or a failure to act is made unlawful or is otherwise prohibited, shall be punishable by a fine not to exceed Two Hundred Dollars ($200.00), and each day a violation shall continue shall constitute a separate offense; provided, however, where the offense is one for which a penalty is fixed by state law, the latter penalty shall govern.

(l) *EFFECTIVE DATE:* This Resolution shall become effective upon approval by the City Councils of the Cities of Dallas and Fort Worth, and after publication of a substantive statement thereof and the penalty for violation thereof, in a newspaper of general circulation in each of the Counties of Dallas and Tarrant. Such notice shall state that a breach hereof will subject the violator to the infliction of a penalty and shall state that the full text of this Resolution is on file in the principal office of the Board, where the same may be read by any interested party.

PASSED, APPROVED AND ORDERED this 7th day of December, A.D. 1976.

(s) Henry Stewart
Chairman,
Dallas-Fort Worth Regional
Airport Board

ATTEST:

(s) Barbara Hollis
Staff Secretary
Dallas-Fort Worth Regional
Airport Board

STATE OF TEXAS
COUNTY OF DALLAS

I, Barbara Hollis, Staff Secretary of the Dallas-Fort Worth Regional Airport Board do hereby certify that the foregoing is a true and correct copy of Resolution No. 76-128 passed and approved by the Dallas-Fort Worth Regional Airport Board on December 7, 1976.

WITNESS MY HAND AND SEAL OF THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD this the 8th day of December, 1976.

(s) Barbara Hollis
Staff Secretary
Dallas-Fort Worth Regional
Airport Board

STATE OF TEXAS
COUNTY OF TARRANT
CITY OF GRAPEVINE

I, Shirley Armstrong, City Secretary in and for the City of Grapevine, Texas, DO HEREBY CERTIFY that the attached is a full, true and correct copy of ORDINANCE No. 77-3 passed by the City Council of said City on the 25th day of January, 1977, at 7:30 o'clock P.M.

**WITNESS MY HAND AND SEAL OF SAID CITY on this the 27th day of January, 1977.**

**(s) Shirley Armstrong**
**City Secretary**
**City of Grapevine, Texas**

**SEAL**

## APPENDIX D

**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

SUSAN FERNANDES, a/k/a
SANTANI on behalf of herself
and all International Society
for Krishna Consciousness
members residing in Dallas

vs.

LEONARD LIMMER, ET AL.

**NO. CA3-77-0417-F**

**ORDER**

The Court has considered the Defendants' Motion for New Trial, and that motion is hereby overruled except as noted below. The motion is based primarily upon the recent decision by the Fifth Circuit in *International Society of Krishna Consciousness of Atlanta v. Eaves*, ——F.2d—— (5th Cir. 1979). I believe that this decision by the Fifth Circuit supports my earlier opinion (465 F.Supp. 493, (N.D. Tex. 1979)), although it is not on point in many respects because the Atlanta ordinance regulating the distribution of literature and solicitation of funds at the Atlanta airport differs significantly from the Dallas/Fort Worth Ordinance.

First, the Fifth Circuit found the Krishnas presented a case or controversy when they challenged the Atlanta ordinance's requirement that donations be accepted only at certain "solicitation booths" and challenged Section 9(a) of the ordinance which made it illegal for a permit holder to "obstruct, delay or interfere with the free movements of

any other person . . . or hamper or impede the conduct of any authorized business at the airport". Section 18 of the ordinance provided that the violation of any part of the ordinance was an "offense" and that any individual convicted of this offense lost the right to distribute literature or solicit funds in the airport for twelve months. The Court held that the Krishnas presented a case or controversy when they sought to challenge Section 18.

The Fifth Circuit found that the other two challenges made by the Krishnas to Sections 8 and 16 were not justiciable. These sections authorized the Commission of Aviation to apportion airport space and time among competing applicants "on as equitable a basis as possible". The Krishnas insisted that terms like "reasonable", "equitable", "efficient and effective operation," and "fair and as equal as possible" were too vague and gave the Commissioner essentially unlimited discretion to circumscribe their activities. The Fifth Circuit found that although the Commissioner's discretion was broad, it did not exist until competing applicants appeared, and there was nothing to suggest in the record before the circuit that competing applicants had appeared or would appear.

Finally, the Fifth Circuit found that a provision of Section 8 giving the Commissioner a general authority to relocate permitted activities presented a case or controversy because it could significantly affect the society's ability to proselytize and solicit.

Reveiwing the Dallas/Fort Worth Regional Airport ordinance, the text of which begins at 465 F.Supp. 493, 506, it is clear that the challenged portions of the ordinance are similar to those in which the Fifth Circuit found that a case or controversy had been presented. The only two provisions challenged by the Krishnas which might not present a case or controversy are the requirements of Section 4A(c)(3) and Section 4A(h)(4)(gg).

Section 4A(c)(3) provides that when costs exceed 25% of the amount collected a permit may be refused; the cost

of solicitation is deemed "unreasonable" and therefore presumably "excessive", although that presumption may be rebutted by a showing of good cause. Section 4A(h)(4)(gg) provides that the licensor is empowered to immediately cancel a permit and close the airport to First Amendment expression regulated by the resolution/ordinance if he deems there exists "any emergency situation . . .". Both of these provisions discourage people from engaging in protected activity and enforcing constitutional rights. Both of these provisions are similar to Section 18 of the Atlanta ordinance which provided that the violation of any part of the ordinance was an "offense" and that any individual convicted of this offense lost the right to distribute literature and solicit funds in the airport for twelve months. The Fifth Circuit held that Section 18 of the Atlanta ordinance presented a case or controversy, and I find that the Krishnas have presented a case or controversy in their challenge to sections 4A(c)(3) and 4A(h)(4)(gg) in the Dallas/Fort Worth ordinance.

"The threat of severe punishment, therefore, is likely to deter members of the society from pressing their religious views as forcefully as they otherwise might; it is likely to induce them to leave some room for error . . . Since the threat of punishment . . . does affect . . . conduct, by causing them to exercise their First Amendment rights less forcefully than they otherwise would, . . . (the Krishnas) have shown the injury necessary to Article 3 jurisdiction". *ISKON v. Eaves*, ——F.2d——, ——(1979).

The Fifth Circuit reached the merits of the justiciable claims it found in *ISKON v. Eaves*. It first reviewed the propriety of Section 9C of the ordinance which provides that no person may "[r]eceive or accept any donation of money (but may direct to a location established under Part 2 of this ordinance any person wishing to make such a donation)". The relevant portion of Part 2 provides: "[S]olicitations shall be conducted only from 'solicitation

booths' which shall be furnished by the Commissioners; and such booths shall be located within the permissible areas at such points as may be designated from time to time by the Commissioner." Section 16.

The Fifth Circuit concluded that the solicitation of funds was no different from proselytizing, distributing literature, and other forms of religious activity in context. "[T]he regulated transfers of money were the medium, not the message." Id. at ..... Thus, Atlanta solicitation booths were regulations of the place and manner of religious expression which did not classify on the basis of content and needed only to be "reasonable". The Fifth Circuit then concluded that as this was an appeal from a request for a preliminary injunction, the district judge did not abuse his discretion when he denied the preliminary injunction because there was little evidence in the record that the Krishnas would lose a large amount of money as a result of the ordinance, and there was more evidence in the record that substantiated Atlanta's interest in limiting solicitations of money to the booths. Thus, although the Fifth Circuit tentatively approved the use of the solicitation booths at this stage of the proceedings, it clearly left open the possibility that on a more well developed record at trial, it might not approve the use of solicitation booths.

In *Fernandes v. Limmer*, the airport board attempted to completely bar the distribution of literature and charitable solicitation inside any terminal building or in any other airport structure, rather than confine the Krishnas to booths. The Dallas/Fort Worth ordinance is thus much broader than the regulation contested in *ISKON v. Eaves*. The regulation in *Limmer* was also challenged as overbroad, whereas the Kishnas claimed the Atlanta regulation was discriminatory. Therefore, under the balancing test suggested by the Fifth Circuit, the governmental interest must be "substantial" or "compelling" before this Court could approve a total ban on terminal solicitations. This court must decide whether the manner of expression is basically incompatible with the normal activity of a particular place at a

particular time, as well as requiring that the regulation be narrowly tailored to serve the interest that assertedly justifies it.

The regulation in *Fernandes v. Limmer* is not narrowly tailored, but is an outright ban on all forms of charitable expression within the Dallas/Fort Worth terminal, and the Dallas/Fort Worth Airport has not shown any "substantial" interest in limiting charitable solicitation or expression to outside the terminal buildings.

Section 9(a) of the Atlanta ordinance provides "[N]o person shall ... [i]n anywise obstruct, delay, or interfere with the free movements of any other person...". The Fifth Circuit held that part of this section was unconstitutionally vague, the part referring to hampering or impeding the conduct of any authorized business at the airport, but that part of the prohibition referring to obstruction, delaying, or interfering with the free movement of any person, was not vague, relying on *Cameron v. Johnson*, 390 U.S. 611 (1968). The Fifth Circuit also noted that the phrase "free movement" was not unconstitutionally vague; it was a fairly restricted term, which in the context of an airport, had a fairly predictable meaning.

Based on the Fifth Circuit's opinion, I find that I must modify my opinion in *Fernandes v. Limmer at* 465 F.Supp. 493, 503 and find that Section 4.A(h)(4)(hh) regarding interference with the free passage of, or access of other persons, and Section 4A(c)(5) regarding obstruction of any entrance or exit to solicit donations or distribute literature are both constitutional, and not overbroad.

However, I still find that the phase used in the Dallas/Fort Worth ordinance referring to the impediment of the flow of pedestrian traffic is still unconstitutionally vague, as the Fifth Circuit held that a similar provision in *ISKON v. Eaves* was unconstitutionally vague. See *ISKON v. Eaves*, ——F.2d—— (5th Cir. 1979).

The "excessive costs" and "emergency situation" provisions are also unconstitutional. First, the "emergency situa-

tion" paragraph, which I reviewed at 465 F.Supp. 493, 504, is clearly discriminatory in its scope. Secondly, the excessive cost provision, also found at page 504, is an attempt at prior restraint." A person may not be prevented from speaking unless what he or she will say—or the time, place and manner in which he or she will say it—will result in direct, immediate and irreparable damage." *ISKON v. Eaves*, —— F.2d————, ———— (5th Cir. 1979). Here the Dallas Fort Worth Regional Airport attempts to prevent persons from speaking when the costs of solicitation exceed 25% of the amount collected, but the Dallas/Fort Worth Regional Airport fails completely to meet the extraordinary burden it must bear to justify this prior restraint.

Thus, with the one modification above, I find that the defendants' motion for new trial should be overruled in all respects.

It is so ORDERED this 28th day of September, 1979.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

## APPENDIX E

**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

SUSAN FERNANDES, a/k/a
SANTANI on behalf of herself
and all International
Society for Krishna
Members residing in Dallas

VS.

LEONARD LIMMER, ET AL.

**NO. CA3-77-0417-F**

**ORDER**

The Plaintiffs have requested attorney's fees in this case. The Defendants urge that attorney's fees should not be awarded because, in a letter dated February 1, 1977, to this Court, the Plaintiffs indicated that they would "also abandon all claims for money damages previously sought in this action." The action referred to was the case which preceded this case, styled: ISKCON v. Dallas Fort Worth Regional Airport, et al., CA3-75-0039-F. Defendants also urge the defense of immunity.

Attorneys' fees are an element of costs and have no relationship to money damages. The Civil Rights Attorney Fee Awards Act of 1976 codified in 42 U.S.C. § 1988, states that in suits under § 1983 and other certain statutes, Federal Courts may "award prevailing parties reasonable attorney's fees, as a part of the cost". *See also Hutto v. Finney*, 437 U.S. 678 (1978).

In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court held that neither sovereign immunity nor "good faith"

defenses insulate state defendants, when sued in their official capacities, from liability for attorney's fees under 42 U.S.C. § 1988. Although the legislative history on common law immunities from damages under 42 U.S.C. § 1983, discussed in Pierson v. Ray, 386 U.S. 547 (1967), was silent, the legislative history of 42 U.S.C. § 1988 clearly states Congress's intention to make all common law immunities inapplicable in 42 U.S.C. § 1988 actions for attorney's fees.

> . . . fee awards are therefore prohibited in cases covered by S.2278 (42 U.S.C. § 1988) in accordance with Congress's powers under, inter alia, the 14th Amendment, § 5 . . . [D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorney's fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether the agency or government is a named party).

S.Rep. No. 94-1011, at 5, United States Code Congressional and Administrative News, 1976, at 5913 (Footnotes omitted and emphasis added); *Consumers Union of United States v. American Bar Assoc.*, 470 F.Supp. 1055 (E.D. Va. 1979); *Rheuark v. Shaw*, —— F.Supp. (N.D. Tex. 1979).

The Defendants have also contended that they are not responsible for the attorney's fees of the Plaintiffs because of legislative and prosecutorial immunity. However, it is clear that the cases relied upon by the Defendant, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, —— U.S. —— (1979) and *Imbler v. Pachtman*, 424 U.S. 411 (1976) only apply to damage suits, and thus are inapplicable to the issue before the Court because costs are not damages and there is no bar to assessing costs against any official in his official capacity. In this case, the members of the Airport Board are not being sued for damages for passage of the Airport ordinance, but rather the ministerial officers of the Airport and Municipality are being sued to enjoin enforcement of that ordinance.

The Fifth Circuit has recognized in an en banc decision that ". . . Congress intended to lift the veil of immunity from state and local governments . . ." in awarding attorneys fees under § 1988 when the defendants were state or local officials or state or local bodies, although "the Attorneys Fee Award Act does not change judicially established rules governing individual immunity for unconstitutional acts committed by a person acting in an official capacity." *Universal Amusement Co., Inc. v. Vance*, 559 F.2d 1286, 1301 (5th Cir. 1977), affirmed and adopted in pertinent parts, 587 F.2d 176 (5th Cir. 1978) (en banc).

Finally, Defendants argue that the parties reached an agreement to settle this case in February of 1976, a proposal which Defendants claim was later rejected by the Plaintiffs, and that therefore this fact should be taken into account in determining who is the "prevailing party". Defendants' theory is that Plaintiffs were offered as much relief as the court granted them and Plaintiffs rejected that relief; thus, Defendants argue that the Plaintiffs did not prevail.

Assuming that the settlement negotiations proceeded as Defendants argue, the settlement negotiations would only be relevant to the issue of attorney's fees in this case if it were found by the Court that the Plaintiffs were obstinate or were litigating the case in bad faith. Further, unsuccessful settlement negotiations, even if they result in a proposal by one side which is ultimately equivalent with the relief granted by the Court, cannot be used to determine the amount of attorney's fees absent evidence of bad faith. I find no evidence that the Plaintiffs negotiated in bad faith in this case.

## AMOUNT OF ATTORNEYS' FEES

The Fifth Circuit has expressly approved the reimbursement of reasonable attorney's fees and expert witnesses fees incurred in a successful litigation of a suit under 42 U.S.C. § 1983. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In *Johnson*, the Fifth Circuit set out

twelve factors that the court must consider in determining what amount to award in attorney's fees. I will review these factors in making my attorney's fee award.

From viewing the evidence presented to the Court, I find that John F. Jordan expended approximately 200 hours of attorney time in this case, from initiation of the *ISKCON v. Dallas/Fort Worth Regional Airport Board* case through the present time in *Fernandes v. Limmer*. Further, I find that Barry A. Fisher has expended a little more than 200 hours in this case. Barry A. Fisher requested that he be compensated at a charge of $90.00 per hour with no distinction between in court and out of court time. John F. Jordan requested he be compensated at a rate of $85.00 per hour for his time. Barry A. Fisher has listed total expenses in connection with this litigation of $2,501.52 and John F. Jordan has listed his expenses as $813.07.

I am convinced that the Plaintiffs have spent many hours preparing this case; I know that I have spent many hours in hearings, considering motions and preparing orders. I have thoroughly examined the attorneys' work product in this case and I have observed the conduct of the Plaintiffs' attorneys, and I can say without any qualification that they possess superior ability, particularly in this First Amendment area of the law.

A number of the issues involved in this case were complex and were novel. For example, the issues of jurisdiction, standing, and indispensable parties were issues which had not been addressed in any detail in previous, similar litigation.[1]

[1]On the other hand, this case as a whole was not so novel or complex as to justify over 400 hours of attorney time. Plaintiffs provided to the court a large number of cases which reached conclusions similar to the result reached in this case, and Mr. Fisher was one of the attorneys in many of those cases, meaning that his research and briefing time in this case should have been minimal. The case was also submitted to the court on stipulated facts without a former trial, further simplifying the case. Therefore I conclude that the number of hours requested for compensation in this case is excessive.

I have no doubts about the excellent experience, reputation and ability of the attorneys as is evidenced by the high quality of their work present in this record. I believe that the case was somewhat undesirable; the Krishna's are not a popular group to represent, as I noted in my earlier opinion. *Fernandes v. Limmer*, 465 F.Supp 493 (N.D. Tex. 1979).[2]

One of the most important factors in my fee and cost award decision, is the amount involved in the case and the results obtained. Here, the Plaintiffs were not seeking damages against the Defendants, but were rather seeking to enjoin them from enforcing what they perceived to be an unconstitutional ordinance. As stated in my earlier opinion, it is clear that the Plaintiffs substantially prevailed in this contention. Finally, I must consider the customary fee, and I note that other courts have awarded fees of approximately $100.00 per hour, in *ISKCON v. Hays*, and $80.00 per hour in *ISKCON v Sullivan.*[3]

Based upon all of these factors, I hereby award the Plaintiffs attorneys fees in the amounts of $10,000 to John F. Jordan and $7,500 to Barry A. Fisher and expenses in

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[2]Mr. Fisher, Plaintiffs California counsel, has requested compensation for his travel to Dallas in this case. The Krishna's had excellent local counsel in this case and as this case was submitted to the court on stipulated facts, without a formal trial, I do not believe Mr. Fisher should be compensated for his travel to Dallas. From my observation, such trips were unnecessary and merely resulted in additional hours and expenses being charged in this case which were unreasonable. Goff v. TI, Inc., 429 F.Supp. 973(N.D. Tx 1977).

[3]I note, however, that the fees requested on a per hour basis make no distinction in amount per hour for the year in which they were charged and billed. Based upon my own experience and a review of decisions in the area, I find that an award of $85 or $95 per hour is unreasonably high for work performed in 1975, 1976, 1977, and 1978, and I reduce my award accordingly. E. G. Goff, fn.2, *supra.*

the amounts of $813.07 to John F. Jordan and $1,007.01[4] to Barry A. Fisher, which are charged as costs against the Defendants in their official capacities, to be paid by the official, in his official capacity, from funds of his agency or under his control, or from the local government or agency, irrespective of the fact that the local government and agency in this case were not named as parties. 42 U.S.C. § 1988; Senate Report No. 94-1011, at 5, U.S. Code and Congressional Administrative News, 1976, at 5913; *Hutto v. Finney*, 437 U.S. 678 (1978).[5]

It is so ORDERED.

/s/ ROBERT W. PORTER
United States District Judge

DATE August 31, 1979

[4]This eliminates travel expenses for Mr. Fisher to Dallas and hotel accomodations. Also, there is an apparent calculation error in computing the amount of Air Freight/Express Mail charges on Exhibit B to Mr. Fisher's application, reducing that cost by approximately $110.

[5]The court awards these fees and expenses on the condition that the clients be reimbursed for the full amounts they have been billed for the services listed in the applications for attorneys' fees, with the attorneys retaining only the excess amount, if any.

## APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN FERNANDES, a/k/a
SANTANI on behalf of herself
and all International
Society for Krishna
Members residing in Dallas

VS.

LEONARD LIMMER, ET AL.

NO. CA3-77-0417-F

### JUDGMENT

Enforcement of City of Dallas Ordinance No. 15369, City of Fort Worth Ordinance No. 7460, City of Grapevine Ordinance No. 77-3, and Airport Board Resolution No. 76-128 by the Defendants is hereby permanently enjoined.

Attorney fees in the amounts of $10,000 to John F. Jordan and $7,500 to Barry A. Fisher and expenses in the amounts of $813.07 to John F. Jordan and $1,007.01 to Barry A. Fisher are hereby awarded as a part of the costs against the Defendants in their official capacities. All other costs are taxed against the Defendants in their official capacities.

It is so ORDERED this 31st day of August, 1979.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

## APPENDIX G

**IN THE**
**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

**SUSAN FERNANDES**

**VS.**

**LEONARD LIMMER ET AL.**

**NO. CA3-77-417-F**

### ORDER

On October 11, 1979 the Plaintiff admitted a letter brief taking issue with the Court's analysis of the recent Fifth Circuit decision in *ISKCON v. Eaves*, 601 F.2d 809 (5th Cir. 1979). On p.5 of this Court's order reviewing the *Eaves* decision and its impact upon *Fernandes v. Limmer*, 465 F. Supp 493 (N.D. Tex. 1979), this Court held that Sections 4A(h) (4) (hh) and 4A(c) (5) were both constitutional and not overbroad.

Section 4A(c) (5) is clearly a prior restraint on speech and is similar to Section 18 in the Atlanta ordinance which the Fifth Circuit held was unconstitutional. *ISKCON v. Eaves*, 601 F.2d 809, 833 (5th Cir. 1979). The Defendants have failed to meet the "extraordinary burden" of showing that this provision somehow prevents direct, immediate and irreparable harm to the Airport Authority.

The citation to Section 4A(c) (5) on page 5 was a misprint, and the correct section referred to should have been Section 4A(h) (4) (ii). This is the section which appears also to be constitutional, based on an analysis of *Eaves*, for the same reasons that Section 4A(h) (4) (hh) is constitutional.

The Court's order of September 28, 1979 is hereby corrected on page 5 to eliminate this typographical error.

IT IS SO ORDERED.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

Date October 29, 1979

## APPENDIX H

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS SCHOOL FOR THE ADVANCEMENT OF VEDIC ARTS AND SCIENCES FOR YOUTH IN AMERICA-GURUKULA (KSAVASYA-GURUKULA) ET AL.

V.

DALLAS-FORT WORTH REGIONAL AIRPORT BOARD ET AL.

Civ. A. No. 3-75-0039-F.
United States District Court,
Northern District of Texas,
Dallas Division

March 21, 1975.

### MEMORANDUM OPINION

ROBERT W. PORTER, District Judge.

This is primarily a first amendment case, involving the free exercise of religion and freedom of speech. The Plaintiffs claim their constitutional rights are chilled impermissibly by the Defendants'[1] practice of having devotees of the Society of Krishna Consciousness arrested and jailed when they offer their literature and solicit donations at the Dallas-Fort Worth Regional Airport.

The individual Plaintiffs and the Plaintiff society have asked this Court to enjoin the Defendants from (a) proceeding further in the criminal charges now pending in the Municipal Court of Grapevine, Texas, (b) continuing or resuming the practice of arresting, detaining, searching and prosecuting Plaintiffs and other Krishna society mem-

[1]The Defendants, in addition to the Dallas-Fort Worth Regional Airport Board, are the board members; the cities of Dallas, Fort Worth, and Grapevine; the judge and the prosecutor of the Grapevine Municipal Court; the airport's chief of security; the Grapevine chief of police, and the executive director of the airport.

bers for their purportedly religious practices, (c) interfering with the Plaintiffs by preventing them from disseminating their literature and religious items and receiving donations at the airport, and (d) enforcing the ordinance under which Plaintiffs have been charged in the municipal court. In addition, Plaintiffs seek money damages and a declaratory judgment that the Defendants' acts and the ordinance are unconstitutional and that Plaintiffs' practices at the airport are constitutionally protected under the first amendment.

This Court's jurisdiction is claimed under 28 U.S.C. §§ 1331 and 1343 as well as §§ 2201 and 2202. I find that the Court has jurisdiction to proceed.

The case is before the Court on a motion for preliminary injunction. Based upon the evidence received at a hearing and the briefs and argument of counsel this Court is unable to pronounce the ordinance in question free of constitutional defects. At the same time, however, I have concluded that an injunction would be improper for the reasons detailed below.

## THE FACTS

Commendably, the attorneys have simplified the Court's task somewhat by stipulating to a number of important facts, which will be paraphrased here for brevity. The Plaintiff International Society for Krishna Consciousness is a Texas nonprofit corporation and is a religious society espousing the religious and missionary views of Krishna Consciousness. Its members have a duty under their vows to distribute religious literature, for which they seek and may accept contributions.

On December 5, 6, 12, 19 and 20, 1974, at least one of the individual Plaintiffs was arrested while distributing Krishna literature and accepting donations at the Dallas-Fort Worth Regional Airport (hereafter, D/FW). One individual Plaintiff was arrested on three different occasions; two were arrested twice each and the fourth was arrested

once. The charges are identical: violating City of Grapevine, Texas, Ordinance No. 72-40, which adopts *in toto* the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board which is the governing administrative body of the airport. (All airport terminal buildings are located in the Grapevine city limits.)

Because it is a violation of the Grapevine ordinance to violate the airport board's regulations, it is important in this case to note that the regulations make criminal a number of acts, including: (a) soliciting funds for any purpose at D/FW without a permit from the board,[2] (b) selling or offering to sell any article or merchandise at D/FW without a permit, concession or franchise from the board,[3] and (c) assembling, or distributing pamphlets or other materials at D/FW without a permit from the board.[4] In the case of (c), in order to obtain a permit, the applicant must—at least three days in advance—notify the board of: (a) the full name and mailing address of the person or organization sponsoring, conducting or promoting the activity; (b) the purpose or subject thereof; (c) the date, hours and exact airport location for which the request is made, and (d) the approximate number of participants.[5]

It is also stipulated that D/FW is owned jointly by the cities of Dallas and Fort Worth. Its roadways, sidewalks, etc., have not been dedicated to public use, and a toll is charged for access to the airport, which is totally fenced to control entry.

[1] More detailed information about the history and physical facilities of D/FW may be found in this Court's opinion in Continental Bus System, Inc. v. The City of Dallas and the City of Fort Worth, 386 F.Supp. 359 (N.D.

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[2]Code of Rules and Regulations of the Dallas/Fort Worth Regional Airport Board, chap. 3, § 4(a).

[3]*Id.*, § 4(b).

[4]*Id.*, § 13(a).

[5]*Id.*

Tex. 1974). That case involved a challenge to another provision of the board's rules and regulations. This Court upheld the regulations in that case, holding that the board legally could exclude common carriers from D/FW while permitting a bus line jointly owned by the two cities to operate there. This holding should not comfort the Cities or the Board in the case at bar, however, because as Mr. Justice Frankfurter noted almost thirty years ago: "It does not seem to me to further constitutional analysis to seek help for the solution of the delicate problems arising under the First Amendment from the very different order of problems which the Commerce Clause presents." Marsh v. Alabama, 326 U.S. 501, 511, 66 S.Ct. 276, 281, 90 L.Ed. 265 (1946) (concurring opinion). In short, what is private property for purposes of the commerce clause is not necessarily private property for purposes of the exercise of First Amendment rights.

## THE YOUNGER DOCTRINE

The Defendants would have this Court abstain from proceeding with this case and defer to the Municipal Court of Grapevine under the doctrine of the *Younger* sextet: Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Bryne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (1971). The *Younger* teaching is perhaps best summed up in the concurring opinion of Mr. Justice Stewart:

> The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction

> or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face . . ., or if there has been bad faith and harassment — official lawlessness — in a statute's enforcement. . . . In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights.

Younger v. Harris, *supra*, 401 U.S. at 56, 91 S.Ct. at 757 (Stewart and Harlan, JJ., concurring.) (Footnote omitted.)

[2] I have considered several facts in deciding not to abstain. For one thing, as noted previously, this case, unlike *Younger*, does not concern a single pending state prosecution; the Plaintiff Gregory R. Stein has been charged three times with violating the Grapevine ordinance, and the Plaintiffs Jean C. Guiffre and Roberta F. Mendelson each have been charged twice. Only the Plaintiff Robert E. Eichelberger faces a single charge.

Additionally, the Plaintiff society has no prosecution pending against it, although it definitely has an interest in the case. Accordingly, declaratory relief on the merits would be proper if grounds for same be proved. Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In Salem Inn v. Frank, 501 F.2d 18 (2d Cir. 1974), the Plaintiffs were three taverns suing to challenge the constitutionality of a local ordinance prohibiting "topless" dancing. Although state criminal charges were brought against one of the Plaintiffs one day after the federal suit was filed — and not the other Plaintiffs — the Second Circuit held that it was proper for the federal district court to proceed on the request for preliminary injunction as to all three Plaintiffs.

Finally, while this Court is extremely reluctant to raise the specter of bad faith and harassment, neither can I rule out the possibility. To illustrate, I need only compare one facet of the fact situation in this case with the parallel situation in another airport literature distribution case, Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir., 1975), hereafter abbreviated CAMP.

In *CAMP*, several members of the Plaintiff organization began distributing free copies of their newsletter in terminal buildings at O'Hare Airport in Chicago. They left the airport after a plainclothes policeman and a uniformed officer informed them leafletting was not permitted and they would be arrested if they persisted. *CAMP, supra*, at 923.

In sharp contrast, the Plaintiff Jean Guiffre testified at the hearing on the motion for preliminary injunction about one of her two arrests at D/FW. She testified that she was seated, talking to a boy who had accepted one of her books and who had donated about sixty-two cents. Then, she testified:

> . . . one of the security officers came charging down through the terminal. He was way over on the other side, and he just came running through the terminal and shouted that "I saw you, Jean, I saw you do it, and you are under arrest." And he took me in and, "Boy," he said, "you better not lie," because the boy was telling him that there was nothing wrong going on, that he wanted the book, and then he also took the boy in and threatened him with arrest if he caused any trouble. That's one that I remember. He took me away immediately to some little room.
>
> Q Were you handcuffed?
>
> A Well, I wasn't handcuffed in the terminal, but later on I was.
>
> • • • • • •
>
> A . . . They take my bag away, take my books away, and then they ask me all kinds of questions in

there, and then they take me from that room and they put handcuffs on real tight, you know, and then they take you by your arm and hustle you into a police car outside, and then they take you to another place where you have to be in a cell.

* * * * * *

A . . . They take everything away from you. They take your neck beads off. It's really a very serious matter for a devotee, because his neck beads are one of his symbols of surrender to his spiritual master, so it's not so nice to have his neck beads taken away.

Q They are physically removed from you; you don't take them off yourself?

A Yes, my neck beads have to be broken to be taken off.

Q They were broken?

A Yes, because they are tied on.

This Plaintiff, a slightly built young woman, did not strike the Court as bellicose or belligerent or likely to pose any physical threat to the D/FW security officers. Like the other Krishna devotees in the courtroom during the hearing, she was quiet and well mannered. Neither cross-examination nor other evidence proffered by the Defendants revealed the existence of any reason for such tactics by the arresting officers.

It is pertinent here to briefly note two prior decisions of the United States Supreme Court, each of which had a factual setting in Dallas. The earlier case, Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943), voided a Dallas ordinance prohibiting the distribution of handbills on city streets. The appellant in that case was a Jehovah's Witness. The later case was Dyson v. Stein, *supra*, where the target of a Dallas police raid was the office of an "underground" newspaper.

Those cases are cited merely to point out that the Dallas-Fort Worth area has not become known as a refuge for

those who would espouse causes unpopular with the majority, or "the establishment." It has been the Court's observation, however, that First Amendment rights, such as those of speech and religion, most often are raised by those who, like the Krishnas, are in the minority and are viewed by the majority as unpopular, if not downright unsavory. It occurs to the Court that if the majority member who would have the itinerant preacher swept off the streets with the 6 P.M. rush, were himself arrested on the streets for cheering the Longhorn Band,[6] or caroling with Dr. Criswell,[7] then suddenly there would materialize a renaissance of majority belief in First Amendment rights, illustrative perhaps of an old Texas axiom: It depends on whose ox is in the ditch. Be that as it may, while Krishna devotees wore ordinary street clothes when at D/FW, they usually wear attire that is, to say the least, distinctive and unconventional. Michael R. Wright, headmaster of the Krishna school in Dallas, testified on cross-examination that Krishna men customarily wear saffron-colored robes, put a white cosmetic called tilak on their foreheads, and shave their heads closely, leaving tails of hair at the back of their heads. Asked whether the costumes, cosmetics and shaved heads attract attention and help spread Krishna Consciousness, he replied, "Just as much as a policeman's uniform helps to attract law and order." Their behavior as well as their appearance is unconventional, since they use chants, dancing, cymbals and other musical instruments in a ritual called Sankirtana.

In short, it is no doubt true, as the brief of the City of Fort Worth mentions, that the activities of the Plaintiffs — even in street clothes — are incompatible with "the atmosphere sought to be preserved" in the D/FW terminal buildings. This is no more persuasive, however, than saying the activities of Mrs. Jamison, the Jehovah's Witness, were unlawful because incompatible with the atmosphere sought to be preserved on the sidewalks of downtown Dallas.

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[6]The marching band of the University of Texas at Austin.

[7]Dr. W. A. Criswell, pastor of the First Baptist Church in Dallas, for whom the Court has the highest regard.

For all the foregoing reasons, I conclude that while the facts do not warrant a preliminary injunction, they likewise do not require abstention.

## THE APPLICABLE LAW

D/FW is not a downtown area with public streets and sidewalks, so Jamison v. Texas, *supra*, is not controlling. D/FW is not a privately owned shopping center, so Food Employees v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), and Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), are not controlling. Two other district court cases brought by Krishna followers — International Society for Krishna Consciousness v. Conlisk, 374 F.Supp. 1010 (N.D.Ill.1973), and International Society for Krishna Consciousness, Inc. v. City of New Orleans, 347 F.Supp. 945 (E.D. La.1972), are not controlling because both cases required determining the legality of Krishna activities on the *public streets*. D/FW is not a jail, so Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966), is not helpful.

The three cases that point the way to the Court's decision in the case at bar are Marsh v. Alabama, *supra*, CAMP v. Chicago, *supra*, and Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973). *Marsh* is helpful because D/FW is analogous to a company town, and the latter two cases, because they involved antileafletting ordinances applicable to airports.

In *Marsh*, a Jehovah's Witness had been convicted in state court of trespass for refusing to stop distributing religious tracts on the sidewalks of Chickasaw, Alabama. The town was owned lock, stock and sidewalks by a private company, but otherwise had all the characteristics of any other American town. Similarly, the cities of Dallas and Fort Worth own D/FW airport and insist that anyone who enters it does so only by grace of their invitation to do so — particularly to board an airplane or transact other transportation-related business. The problem with the cities' position is that:

> [o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
>
> • • • • • •
>
> The managers appointed by the corporation cannot curtail the liberty of press and religion of these people [i.e. the residents and those passing through] consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

*Marsh*, supra, at 506, 508 of 326 U.S. at 278 of 66 S.Ct.

The teachings of *Marsh* are no less applicable to D/FW because it is a governmentally owned "company town" rather than a privately owned "company town." Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946) (a companion case to *Marsh*, reversing the conviction of a Jehovah's Witness in a Texas village owned by the United States.)

In *Kuszynski, supra*, the Ninth Circuit directed the district court, on remand, to enjoin portions of an Oakland, California, ordinance regulating the distribution of written material at the Oakland airport. The district court was directed to conduct a hearing to determine which portions of the ordinance were reasonably necessary for the management of the airport.

The Oakland Ordinance, it should be noted in comparing it to the ordinance governing D/FW, forbade distribution of literature in certain areas of the airport (which are not set forth in the opinion). No materials could be distributed unless they were first submitted to the airport manager before distribution, and the distributor's identity and purpose were required to be revealed.

*CAMP*, *supra*, may not be on all fours with the case at bar, but it comes closer than any other case to which this Court has been cited. It was not called to the Court's attention by counsel, which is understandable since it was decided only a few weeks before the hearing and even at this writing has not appeared in the advance sheets.

*CAMP* was based on freedom of speech, press and peaceable assembly, not religion. However, the Plaintiffs here also complain that the Grapevine ordinance infringes their freedom of assembly and speech. The *CAMP* literature was distributed free; the Krishna literature is not sold for a fixed price, but only rarely will it be given as a gift unless a donation is received in return. The Chicago regulation was unwritten; the D/FW regulation is written. The City of Chicago argued to the court that O'Hare Airport terminal buildings are not public places; the cities of Dallas and Fort Worth insist that D/FW is not a public place. In *CAMP*, the distributors did not attempt to hand out leaflets on airplanes or leased property; at D/FW, the terminal buildings are leased to the airlines. This, however, is a distinction without a difference.

There are two significant distinctions between *CAMP* and the present case. First, since the Chicago distributors were not selling their publication or accepting donations, there was no challenge to the portion of the Chicago ordinance that prohibited selling anything at O'Hare without a concession or lease. The portion that was involved was the one making it unlawful to "distribute literature of any nature." The Plaintiffs in this case are charged not with distributing free literature but instead with soliciting a business or trade at the airport without a permit, concession, or franchise.

Secondly, the holding in *CAMP* was limited geographically. The circuit court wrote:

> . . . we recognize, as the district court did when it excluded the "fingers" leading to the arrival and departure gates from its injunction, that the Constitution does not prohibit all regulation of leafletting in publicly owned facilities. Regulations narrowly drawn to protect

> the state's substantial interests with the least possible constriction of the exercise of free speech and press have long been upheld. Cox v. Louisiana, 1965, 379 U.S. 559, 562, 85 S.Ct. 476, 13 L.Ed.2d 487. Thus regulations prohibiting leafletting might validly be extended from the passageways leading to the arrival and departure gates to include also leafletting at check-in counters, for example, if it should appear that such activities substantially interfere with rapid and efficient airport operations.

*CAMP*, *supra*, at 926 of 508 F.2d

[3] The D/FW terminal buildings in which Plaintiffs were arrested are not designed like those at O'Hare and many other airports. At D/FW, there are no fingers and passageways in the usual sense. Each terminal building is comparable to the conventional departure lounge in other airports. Thus it is at least plausibly arguable that the cities may constitutionally prohibit the Krishna devotees from distributing literature and soliciting and accepting donations in the terminal buildings at D/FW. For this reason as well as the foregoing reasons, the Court will not at this time enjoin enforcement of the ordinance.

But applying the logic of *CAMP* and *Marsh* to the D/FW situation, and taking judicial knowledge of the physical facilities at D/FW, the Court suspects the cities will be hard pressed at a hearing on the merits to justify banning the Plaintiffs completely from the entire 18,000-acre area that is the Dallas-Fort Worth Regional Airport. For example, under the *Marsh* and *Jamison* cases, can the airport board and the cities that have adopted its rules constitutionally prohibit the Krishna devotees from offering their literature on the sidewalks at D/FW? This intriguing question cannot be answered at this stage of the case; it must await a hearing on the merits and, of course, by asking the question, I do not intend to imply what the correct answer is.

An order will be entered denying the Plaintiffs' motion for a preliminary injunction, and the case will be set for hearing on the merits. Counsel for the Defendant Dallas-Fort Worth Regional Airport Board is requested to draw such an order and submit it to the Court within five days.

## APPENDIX I

### RESOLUTION NO. 76-128

A Resolution by the Dallas-Fort Worth Regional Airport Board amending Resolution No. 71-172, entitled "The Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board" by adding Section 4A. to Chapter Three thereof, to be entitled "Standards for Fund Solicitation Control and Control of Literature Distribution"; Defining Terms; Providing the conditions and standards under which Permits may be granted to, or denied, Applicants for charitable and other fund solicitations on the Airport; Providing the conditions and standards under which Permits may be granted to Applicants for the distribution of Literature on the Airport, in connection with a charitable solicitation; Providing the conditions and standards under which Permits may be granted to Applicants in connection with political campaigns and Labor-Management Disputes; Providing for fees to be charged for issuance of such Permits and for the cancellation of outstanding Permits; Providing for the regulation of the time, location, manner and number of persons who solicit funds under the Permit authority; Providing for Appeals from Permit denials; Providing a Penalty, a Severability and Savings Clause, and declaring an effective date.

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WHEREAS, it is the desire and purpose of the Dallas-Fort Worth Regional Airport Board to more effectively control Charitable Fund Solicitation and Literature Distribution on Airport premises, and to protect the travelling public as well as persons desiring to solicit for charities, to balance the legal rights of each group, and to protect the public health, security, safety and general welfare;

NOW, THEREFORE, BE IT RESOLVED BY THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD:

SECTION 1. That the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, adopted

by Resolution No. 71-172, is hereby amended by adding to Chapter Three thereof, entitled "Personal Conduct," a section numbered 4A., to be entitled "Standards for Fund Solicitation Control and Control of Literature Distribution," such Section to read as follows:

"SECTION 4A. STANDARDS FOR FUND SOLICITATION CONTROL AND CONTROL OF LITERATURE DISTRIBUTION:

(a) *DEFINITIONS:*

(1) "Charitable Organization" is defined as any person, firm, group, partnership, corporation or association whose avowed purpose and object is to benefit, assist, aid and further the following causes:

(aa) philanthropy;

(bb) assistance to persons who are poor, impoverished, destitute, underprivileged, needy, diseased, injured, crippled, disabled, handicapped, or in need of physical or mental rehabilitation;

(cc) churches, religious societies or other religious sects, groups or orders espousing spiritual and altruistic motives or conduct;

(dd) the teaching of patriotism, or promoting relief and assistance to this nation's war veterans;

(ee) beneficial education of the mind or assistance to educational institutions; or

(ff) the protection, shelter and sustenance of animals.

(2) "Charitable Solicitation" is defined as seeking money donations, pledges thereof, or anything of value to benefit, assist, aid and further the cause of a charitable organization, either orally or by literature distribution.

(3) "Literature" is defined as books, pamphlets, handbills, tracts, cards, circulars, pictures, films, magazines, or any other written or printed material.

(b) *PERMITS:* It shall be unlawful for a Charitable Organization to solicit funds on the Airport premises without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. The Application shall be submitted to the designated representative of the Executive Director at least three (3) days in advance of the first day sought for solicitation, and shall state:

(1) The full name and mailing address of the person or organization sponsoring, conducting or promoting the fund drive; if the mailing address is a Post Office Box Number, the actual street address shall also be stated;

(2) Whether or not the Applicant is a branch or division of a national organization, and if so the name thereof, and the mailing and street address of same;

(3) If the Applicant is a Texas corporation, a copy of its corporate Charter, as amended, shall be furnished; if it is a foreign corporation, a copy of its Authorization Certificate to do business in the State of Texas shall accompany the Application;

(4) The purpose or object of the Charitable Solicitation;

(5) The date or dates and hours of the solicitation;

(6) The number of persons to participate in the solicitation and the true legal name and address of each;

(7) Such other pertinent information found to be necessary by the designated official to adequately enforce the terms of this Resolution.

(c) *REASONS FOR REFUSAL OF PERMIT:* The Application shall be granted and the Permit shall issue unless one or more of the following facts is found to exist:

(1) that one or more of the statements in the Application is not true;

(2) that the Applicant or any agent or representative of the Applicant who will participate under the Permit

is presently or has been engaged in a fraudulent transaction or enterprise, or has been convicted if a felony or other criminal offense involving moral turpitude;

(3) that the expected cost of solicitation will be excessive in relation to the gross amount to be collected. Any such cost of solicitation in excess of twenty-five (25%) percent of the total amount collected shall be considered and presumed to be unreasonable, but this presumption may be rebutted by Applicant upon good cause shown. Cost of solicitation shall include any money or thing of value not reserved specifically and entirely to assist, aid or further the announced charitable cause. All accounting and bookkeeping records, government reports, all tax records for the preceding two years, and any other relevant papers or documents with reference to the Charitable Solicitation may be examined and audited either at the time of application, during the solicitation, or at or after the expiration of the Permit;

(4) when there is good reason to believe that the granting of the Permit will result in a direct and immediate danger or hazard to the public security, health, safety or welfare;

(5) when the Applicant or any agent or representative of the Applicant who will participate under the Permit has previously violated any portion of the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, or has violated any of the terms and provisions of any prior Permit.

(d) *PERMITS FOR CHARITABLE LITERATURE DISTRIBUTION:* It shall be unlawful for a Charitable Organization to distribute Literature or any other article on the Airport in connection with a Charitable Solicitation without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. Action on such Applications and Permits shall be governed by Paragraphs (b) and (c) set forth above for Charitable Solicitation. Permits for distribution of Literature which

espouses a charitable cause, where no solicitation for, and no acceptance of, money or anything of monetary value, is involved, shall be governed by Paragraphs (b) and (c) set forth above, except subparagraph (c) (3).

(e) *PERMITS FOR POLITICAL OR LABOR-MANAGEMENT LITERATURE DISTRIBUTION:* It shall be unlawful for a person to distribute Literature on the Airport whether or not there is solicitation or acceptance of money or anything of monetary value therefor, which is distributed in connection with the campaign of a political candidate or political issue, or in connection with a labor-management dispute, without first applying for and obtaining a Permit on forms prescribed by the Executive Director or his representative. Action on such Applications and Permits shall be governed by Paragraphs (b) and (c) set forth above, except subparagraph (c) (3).

(f) *FEES:* A fee of $6.00 per day for each day granted in any Permit referred to herein shall be charged and collected in advance to defray a part of the costs of Board employees' time spent in investigation, Permit preparation and subsequent supervision.

(g) *CANCELLATION OF PERMITS:* Any Permit granted hereunder may be cancelled after issuance if any of the above reasons for prior refusal should be discovered, or become apparent during the solicitation period.

(h) *TIME, LOCATION, MANNER AND NUMBER OF PERSONS INVOLVED:* When Permits for Charitable Solicitation, Charitable Literature Distribution, a combination of the two, or for political advertisement or labor-management disputes are granted, the following rules and standards shall apply:

(1) Location: Such Permits shall be restricted to the sidewalks of the Airport and the sidewalks of the Terminal Buildings on both levels thereof, but shall never be permitted inside any Terminal Building or in any other Airport structure.

(2) Time: Permits shall be issued for no more than a total of eight (8) days in any one calendar month, but the days need not be consecutive. Permit holders shall be restricted to the hours of 9:00 o'clock A.M. to 6:00 o'clock P.M. on the days of operation.

(3) Number of Persons: Not more than two (2) persons representing any one group or organization shall be permitted on a specified area of the sidewalks of a Terminal Building at one time, and no more than a total of four (4) persons from that group shall be permitted at one Terminal Building.

(4) Manner of Operation:

(aa) Each person included in a Permit shall be issued, and shall wear, a badge, nameplate, card or other personal identification on the upper clothing and in a manner clearly visible to the public. Such identification shall state the true and correct legal name of the solicitor and the organization or cause represented. It shall not be transferred to another person and must be returned to the issuing Airport official at the expiration of the Permit.

(bb) No Permittee shall make loud noises or create any other disturbances. No dancing, chanting, use of drums, cymbals, other musical instruments, or noise-making devices shall be permitted.

(cc) Permittees at all times are subject to all laws: Federal, State or Local, regarding fraud, assault, battery, theft, littering, picketing and all other laws relating to the conduct of persons in public places.

(dd) Permittees, when soliciting donations in connection with the distribution of Literature or the distribution of other articles, shall inform the person approached by them that a donation is solicited prior to the time such material is delivered to the prospective donor and such solicitor shall make the proper money change when informed of the amount being donated.

(ee) No Permittee shall erect or place a table, bench, chair, or other structure on any sidewalk or other premises of the Airport.

(ff) No Permittee shall distribute candy, gum or other food snacks or any food product, and shall not pin, tie, or attach any flower or other symbol, insignia or article on the clothing, luggage or vehicle of passengers or other persons at the Airport.

(gg) The Official who issues the Permit may cancel same due to any emergency situation, unusually congested conditions in the areas of the Permit caused by severe weather, schedule interruptions, or for security measures. At Permittee's option, a temporary reassignment of location may be utilized outside the location of the emergency condition, but not inside any Terminal Building or other Airport structure.

(hh) No Permittee shall interfere with the free passage of, or access of, other persons along sidewalks or at any entrances to or exists from a Terminal or any other structure; specifically, no Permittee shall ever obstruct any entrance or exit to solicit donations or distribute Literature or other articles.

(ii) No Permittee shall enter any stairwell, staircase, elevator, or escalator vestibule for solicitation or distribution purposes and shall not impede the flow of pedestrian traffic to sidewalk baggage collection or baggage loading areas. No person shall be impeded or approached while loading or unloading baggage from any public or private vehicle.

(jj) No Permittee shall operate in the roadways adjoining the Terminal sidewalks, nor in any other manner impede vehicular traffic in any roadway.

(kk) All Literature distributed by a Permittee which may be discarded by recipients shall be retrieved and the solicitation area cleared and cleaned of same daily.

(i) APPEALS: When an Application for a Permit hereunder is refused, for any one or more of the reasons herein stated, the Airport Official shall state the reason or reasons for such refusal in writing and deliver a copy to the Applicant. The Applicant may appeal such refusal to the Chairman of the Dallas-Fort Worth Regional Airport Board, who shall either hear and decide such appeal, or who may at his discretion appoint one or more Board members to hear and pass upon such appeal. If such appeal is overruled, no other administrative remedy shall be appropriate, and the Appellate process shall be considered administratively exhausted.

(j) SEVERABILITY AND SAVINGS CLAUSE. The sections, paragraphs, sentences, clauses and phrases of this Resolution are severable, and if any phrase, clause, sentence, paragraph or section of this Resolution shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Resolution, since the same would have been enacted without the incorporation in this Resolution of any such unconstitutional phrase, clause, sentence, paragraph or section. Further, the passage of this Resolution shall in no manner affect any other provisions of the Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board, and all such other provisions shall remain in full force and effect.

(k) PENALTY: The violation of any provision of this Resolution where an act or a failure to act is made unlawful or is otherwise prohibited, shall be punishable by a fine not to exceed Two Hundred Dollars ($200.00), and each day a violation shall continue shall constitute a separate offense; provided, however, where the offense is one for which a penalty is fixed by state law, the latter penalty shall govern.

(l) EFFECTIVE DATE: This Resolution shall become effective upon approval by the City Councils of the Cities of Dallas and Fort Worth, and after publication of a substantive statement thereof and the penalty for violation

thereof, in a newspaper of general circulation in each of the Counties of Dallas and Tarrant. Such notice shall state that a breach hereof will subject the violator to the infliction of a penalty and shall state that the full text of this Resolution is on file in the principal office of the Board, where the same may be read by any interested party.

PASSED, APPROVED AND ORDERED this 7th day of December, A.D. 1976.

/s/ HENRY STEWART
CHAIRMAN,
DALLAS-FORT WORTH REGIONAL AIRPORT BOARD

ATTEST:

/s/ BARBARA HOLLIS
Staff Secretary
Dallas-Fort Worth Regional Airport Board

STATE OF TEXAS
COUNTY OF DALLAS

I, Barbara Hollis, Staff Secretary of the Dallas-Fort Worth Regional Airport Board do hereby certify that the foregoing is a true and correct copy of Resolution No. 76-128 passed and approved by the Dallas-Fort Worth Regional Airport Board on December 7, 1976.

WITNESS MY HAND AND SEAL OF THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD this the 8th day of December, 1976.

/s/ BARBARA HOLLIS
Barbara Hollis
Staff Secretary
Dallas-Fort Worth Regional Airport Board

## APPENDIX J

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

**CIV. NO. CA-3-77-0417-F**

SUSAN FERNANDES, ET AL,

*Plaintiffs,*

VS.

LEONARD LIMMER, ET AL,

*Defendants.*

## STIPULATION OF FACTS

TO THE HONORABLE COURT:

COME NOW the Attorneys for all Parties in the above styled and numbered cause, and would show the Court that all the Parties agree and stipulate the following facts:

1. The transcript of all the testimony and Exhibits introduced at the hearing held on January 30, 1975, in Cause No. CA-3-75-0039-F, styled International Society for Krishna Consciousness School, etc., et al. vs. Dallas Ft. Worth Regional Airport Board, et al., shall become a part of the evidence and the record of this case. The Parties do not stipulate as to the truth of the testimony of the witnesses at that trial.

2. True and correct copies of the Dallas-Ft. Worth Regional Airport Board's Resolution No. 76-128, City of Dallas Ordinance No. 15369, City of Fort Worth Ordinance No. 7460 and the City of Grapevine Ordinance No. 77-3, are attached to this Stipulation, and it is agreed that each and every such instrument was duly and legally passed accord-

ing to the laws of the State of Texas and the Charters of the respective Cities, were legally published as required by law, and are in full force and effect at the date of this Hearing.

3. That although the Resolution and the Ordinances are in effect and have been for quite some time, no attempt has been made to enforce same due to the pendency of the original suit, and the agreement between the Parties evidenced by the Permit issued December 21, 1975, issued by Dallas-Ft. Worth Regional Airport Board, (Exhibit 1) and the Letter Agreement dated February 1, 1977 (Exhibit 2).

4. That the Dallas-Ft. Worth Regional Airport is owned jointly by the Cities of Dallas and Fort Worth. Its roadways, sidewalks, etc., have not been dedicated to public use, and a toll is charged for access to the airport which is totally fenced to control entry.

5. That the entire interiors of Airport terminals situated at the Dallas-Fort Worth Regional Airport are leased to commercial airline carriers at this time and have been so leased since January 13, 1974, such leases each having a term that runs beyond the year 2000 A.D. That Plaintiff's Exhibits 3, 4 and 5 at the hearing on November 15, 1977, entered into between the Dallas-Fort Worth Regional Airport Board and Braniff Airways, Incorporated, dated August 1, 1977, typifies the other leases used by the Board with all the other airline tenants in the other airport terminals.

6. The Dallas-Fort Worth Regional Airport Board maintains its own Police Department to enforce Federal, State and local law, both inside and outside of terminal buildings and within the geographical confines of the Dallas-Fort Worth Regional Airport.

7. The Parties may present for inclusion in the record any photographs of the Dallas-Fort Worth Regional Airport they wish included in the record provided they are identified as to location and scene portrayed.

**EXECUTED this 22nd day of February, A.D., 1978.**

BARRY A. FISHER
JOHN F. JORDAN
*Attorneys for Plaintiffs*

**By:** _____

CHARLES C. WELLS
C. MERRILL BIERFELD
*Attorneys for Defendants*

**By:** _____

Permit No. 25133-A-1

DALLAS-FORT WORTH REGIONAL AIRPORT BOARD
Post Office Drawer DFW
Dallas-Fort Worth Airport, Texas 75261

## TEMPORARY PERMIT

The Dallas-Fort Worth Regional Airport Board (herein called "Airport Board") hereby grants to Permittee the hereinafter described privilege at the Dallas-Fort Worth Regional Airport (herein called the "Airport") in accordance with the terms and conditions hereof; and said Permittee agrees to perform all other obligations imposed upon it in said terms and conditions.

(1) PERMITTEE: International Society of Krishna Consciousness
John Jordan, 2818 Maple,
Dallas, Texas 744-3621 or 341-2042

(2) PERMITTEE'S ADDRESS: 5430 Gurley Street
Dallas, Texas 75223
827-6330

(3) PRIVILEGE: To distribute books, literature, etc. concerning the advancement of vedic arts and to accept contributions, all in the areas as designated in the attachment hereto.*

* In accommodation pending litigation without prejudice to either party.

(4) FEES: None

(5) EFFECTIVE DATE: December 23, 1975

(6) TERMINATION DATE: At midnight-January 12, 1976, or earlier, for cause by the Executive Director.

DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD

_____
Executive Director

_____
Legal Counsel

_____

ATTEST:

_____

SCHEDULE A

Privilege is subject to the approval of the airlines to use their leased Terminal Areas in the Passenger Enplaning and Deplaning Complex. Permittee shall meet and comply with all reasonable rules and regulations of such airlines. Permittee shall pay any and all charges assessed at the Parking Plazas.

February 1, 1977

Hon. Robert W. Porter
United States District Judge
1100 Commerce Street
Dallas, Texas 75202

RE: ISKCON v. Dallas Ft. Worth Regional Airport, et al
No. CA 3-75-0039-F

Dear Judge Porter:

The Dallas-Ft. Worth Regional Airport Board has amended its regulations concerning the distribution of literature and the solicitation of donations at the airport. These rules are the central issue in the above referenced action and the parties have entered into the following agreement to expedite resolution of the issues now before the Court and to serve the parties individual convenience. This agreement in no way constitutes any accord or settlement of disputes, nor is it intended to be an abandonment or compromise of any claim or defense previously advanced by any party.

It is agreed that the Plaintiffs and Defendants will continue the current permit agreement that allows Plaintiffs limited access to the airport for their activities as it is currently in effect or as may be modified by agreement between the parties until the Court should resolve the issues before it or until May 2, 1977. If the Court has not ruled by May 2, 1977, the Defendants may, at their discretion, notify the Plaintiffs in writing that they plan to discontinue the permit agreement 30 days from the date of the notice. Such notice shall be served by certified mail on Plaintiff's attorney, John F. Jordan, at his office at 2818 Maple Avenue, #103, Dallas, Texas 75201. Plaintiffs may then seek such relief as may seem appropriate at that time.

Plaintiffs will bring the new ordinance before the Court either by amending its current pleadings or by filing a new action. Plaintiffs will drop all unnecessary parties from this action and will limit parties Defendants to the Executive Director of the airport, the Airport Director of Public Safety and The City of Grapevine Prosecuting Attorney.

Plaintiffs will also abandon all claims for money damages previously sought in this action.

The Defendants agree to drop all pending criminal prosecutions against Plaintiffs, Jean C. Giuffre, Robert E. Eichelberger, Gregory R. Stein and Roberta Mundelson and any other member of ISKCON currently being prosecuted for violation of Dallas Ft. Worth Airport solicitation regulations and Defendant City of Grapevine agrees to refund all cash escrow bonds posted by Plaintiff ISKCON to the Society.

The parties agree to make every effort to reduce all facts to written stipulations and to submit this matter to the Court on stipulations, briefs and oral agreement.

The parties understand the Court has ordered all stipulations and briefs to be filed on or before March 21, 1977, and that the parties are to appear on March 31, 1977 at 9:00 A.M. to present oral argument, each side to be allotted 30 minutes.

Respectfully submitted,

/s/
John F. Jordan
Barry A. Fisher
Attorneys for the Plaintiffs

/s/
Charles Wells
Attorney for D/FW Regional Airport

/s/
Lee Holt
Attorney for the City of Dallas

/s/
S. G. Johndroe, Jr.
Attorney for the City of Ft. Worth

/s/
John Boyle
Attorney for the City of Grapevine

## APPENDIX K

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

**CIV. NO. CA-3-77-0417-F**

SUSAN FERNANDES, ET AL,

*Plaintiffs,*

Vs.

LEONARD LIMMER, ET AL,

*Defendants.*

### ORDER NUNC PRO TUNC

It is ordered and decreed in the above case, for the purposes of Appeal, that the transcript of all the testimony and Exhibits introduced at the Hearing held on January 30, 1975, in Cause No. CA-3-75-0039-F, styled International Society for Krishna Consciousness Schools, etc., et al. vs. Dallas-Fort Worth Regional Airport Board, et al., shall become a part of the evidence and the record of this case. This was the stipulation of the Parties to the above Cause, and this Order is entered on this 15th day of November, 1979, as if the time of its entry were to be dated October 26, 1979 and is Nunc Pro Tunc in nature.

It is so ordered.

ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

## PORTIONS OF MUNICIPAL AIRPORTS ACT, REVISED CIVIL STATUTES OF THE STATE OF TEXAS

"Art. 46d-14. Joint operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term 'public agency' includes municipality, as defined in this Act, any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term 'governing body' means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency or preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provi-

sions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section."

"Art. 46d-15. Public purpose, county and municipal purpose

The acquisition of any land or interest therein pursuant to this Act, the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection and policing of airports and air navigation facilities, including the acquisition or elimination of airport hazards, and the exercise of any

other powers herein granted to municipalities and other public agencies, to be severally or jointly exercised, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; . . . ."